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Brf. of Stiles & Holladay for (

Filed Sept. 13, 1897.

IN THE

Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, Petitioner,

vs.

RICHMOND TRACTION COMPANY, et al.

On Certiorari to United States Circuit Court of Appeals for the Fourth Circuit.

OPENING

Brief for Petitioner Hyer.

ROBERT STILES,
ADDISON L. HOLLADAY,
Solicitors and Counsel
for Petitioner Hyer.

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EXPLANATORY PREFACE.

The size of this brief and the extraordinary number and length of extracts from the authorities which it contains call for explanation; but, when this is given, it is believed the Court will not only excuse but approve the paper. The brief is so arranged under headings, and so analyzed by the index, that the reader may readily turn to the discussion of that topic which for him is the point of interest or of difficulty in the cause, avoiding what he may regard as not requiring elucidation or argument.

In further explanation of the length of the brief, it should be noted that the defendants advanced not less than ten grounds of demurrer to the complainant's bill; and, while most of these seemed to us not only to lack merit, but to be destitute even of plausibility, yet it might not be prudent to assume that the Court will take this view of the matter.

But the great elaboration of the paper is due chiefly to the character of one of these grounds, which involves a question of great public interest and unusual complexity and difficulty, calling for the exercise of one of the greatest and most delicate of all the powers of a court, to-wit: the power to pronounce a contract between parties of full age and competent understanding, freely and voluntarily entered into, to be void, as contravening the public policy of a State; a power and function which several great English jurists have held to be rather legislative than judicial, and to be properly exercised by the Legislature through the medium of positive statute. Here again, we are of opinion that a plain, common-sense, *prima facie* view of the matter completely extricates the case from the tangled web of conflicting decisions on this vexed question, and stamps the contract set out in the bill as a natural, lawful and altogether proper agreement, in no way contravening the public policy of the State; yet, manifestly it would not do to

assume that this will be the view of this honorable Court, especially, since the Judges below differed as to whether or not this contract was obnoxious to this objection. We have deemed it proper, therefore, to embody in our brief somewhat of an analytical review of the authorities upon the law of public policy as affecting contracts, and that upon both branches of the subject, to-wit: first, what contracts are invalidated by the law of public policy; and second, under what circumstances courts of justice will entertain the application of one of two contracting parties to compel the other to account for and to pay over the complainant's share of the proceeds of an illegal or immoral contract.

The following, then, is the general plan of this paper. It consists of three general divisions: the *Preface;* the *Brief* proper, discussing the only two questions deemed by the lower courts to be worthy of notice; and an *Appendix* embracing a discussion, more or less brief, of the remaining eight grounds of demurrer.

The preface explains itself.

The brief proper discusses the following questions:

FIRST.

(A.) Whether it be necessarily contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

And if the above be answered in the affirmative, then—

(B.) Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrong-doer, that the original contract was immoral or invalid?

SECOND.

Whether the complainant has a plain, adequate and complete remedy at law?

These questions are discussed under sub-heads, each of which is so designated and indexed that it may be readily found.

Authorities cited are so listed, indexed and spaced that any case may be read or passed at pleasure.

We do not regard the appendix as an integral part of the brief, because we do not consider any position discussed in it as having any important bearing upon the decision of the case. We, of course, understand that a court, when sustaining a demurrer upon any one ground, is not called upon to notice the remaining grounds, even though (it should be) inclined to deem them well taken. It may be proper to remark, however, that upon the argument of the cause in the Circuit Court of Appeals, the entire drift of the discussion seemed to indicate that the bench, and the counsel upon both sides, were agreed that the fate of the demurrer hung upon the Public Policy defense, or upon that and the remedy at law.

We believe this will be the view of the justices of this honorable court also, after glancing over the recital of these eight points in the index; yet, if any member of the Court shall feel desirous of looking further into any one of these points, he will find a discussion of it in the appendix, at the page indicated in the index.

The brief proper, as already stated, is taken up with the discussion of the only two grounds of demurrer to which any one of the judges who sat upon the case below in either court seemed to attach the slightest importance, to-wit: Public Policy and Remedy at Law.

IN THE

Supreme Court of the United States.

October Term, 1897.

No. 379.

L. H. HYER, PETITIONER,

VS.

RICHMOND TRACTION COMPANY, ET AL.

ON WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Opening Brief for Petitioner Hyer.

It is proper that this brief should open with a statement of the basis of fact upon which we propose to discuss the case: and, because we cannot present such basis more clearly and succinctly than was done in our petition for *certiorari* filed and acted upon the last day of the last session of this Honorable Court, we here reprint the first twelve pages of that petition, breaking the recital into headings, in order that the Court may be able to determine just where to look for what it may consider most relevant and important to the points to be passed upon.

Statement of Case.

1. Your petitioner, a citizen of the State of Missouri, by profession a civil engineer, in the early summer of 1895, secured from the City Council of the City of Richmond, Virginia, the grant to himself and associates, under the name and style of the Richmond Conduit Railway Company, of a franchise to build a street railway on Broad and connecting streets in said city.

2. This franchise, as finally passed, not being in all respects what your petitioner had asked, upon open conference with the Street Committee of said City Council he was assured that the desired amendments would be made on condition that he would deposit $10,000.00 in one of the banks of the City of Richmond, Va., upon the terms and provisions of a paper to be prepared by the City Attorney, as a pledge of his intention and ability to build the road, which deposit your petitioner made, and, being thus assured of his charter, went North to see his financial backers and to prepare for the vigorous prosecution of his enterprise.

3. Arrived in New York, he was surprised to find one Phil. B. Sheild, an attorney at law of Richmond, Virginia, in conference with the parties, Messrs. Stewart & Co., Wall street brokers, who had undertaken to furnish the necessary capital for his (petitioner's) enterprise, said Sheild urging said brokers to back him and his associates, who were seeking to induce the City Council of Richmond, Virginia, to grant the franchise for the Broad street railway to them, under the name and style of the Richmond Traction Company, instead of to your petitioner and his associates, under the name and style of the Richmond Conduit Railway Company.

4. After some conference, by the advice of Messrs. Stewart & Co., who were to furnish capital for building the road as aforesaid, an amicable understanding and basis of co-operation was arrived at between the two parties represented respectively by your petitioner, and said Sheild, which was embodied in a contract, in the shape of a joint letter, addressed to S. H.

G. Stewart, Esq., head of the house of Stewart & Co., which letter is in the following words and figures to-wit:

Contract of August 9, 1895.

"NEW YORK, August 9th, 1895.

"S. H. G. Stewart, Esq.:

"40 Wall Street, City.

"Dear Sir:

"We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to co-operate one with the other in securing a franchise for said railway and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER.
"(Signed) PHIL. B. SHEILD."

Contract Faithfully Executed by L. H. Hyer

5. Your petitioner and his associates in good faith performed their part of this contract, and upon this basis the franchise was granted by the City Council of Richmond to the "Richmond Traction Company," it being understood with said Sheild, representing his Traction associates, that the names of your petitioner and two of his associates and of three from the Traction side were to be inserted in the franchise, as incorporators.

Contract Violated and Repudiated by Defendants.

6. Said Sheild and his Traction associates, however, utterly failed to carry out their part of said contract, and, leaving out the names of petitioner and his associates, procured the grant of the franchise contemplated in said letter of August 9th, 1895, to incorporators, all of them of the Traction side, and ultimately, when petitioner demanded an explanation, in terms repudiated the obligations of the contract, denied that the Richmond Traction Company was bound thereby, and denied any and all rights of your petitioner thereunder, or in the Traction franchise and enterprise.

Notice Given of Complainant's Rights and Bill Filed.

7. Your petitioner published the above contract of August 9, 1895, in a Richmond (Va.) newspaper before the final passage of the ordinance granting said Richmond Traction franchise to Phil. B. Sheild and others, and promptly thereafter gave, to all parties known to be interested in the Richmond Traction Company and its said franchise and enterpise, the fullest notice practicable of his rights and claims in the premises, and being met only by repeated and contemptuous denial of said rights, on the 30th day of October, 1895, he brought his bill, in the Circuit Court of the United States for the Eastern District of

Virginia, at Richmond, setting forth in fuller form the above recited facts, making an exhibit of the Traction franchise or ordinance, making parties of said Richmond Traction Company, the incorporators mentioned in said ordinance, and all other persons known to be interested in said Traction franchise and enterprise, alleging that all said parties had acted with full notice and knowledge of petitioner's rights in the premises; that he had been unjustly deprived of said rights, and would be exposed to irreparable injury unless the court should interfere by injunction to prevent said franchise, or any part thereof, from being transferred, assigned or encumbered to or in favor of innocent parties unaffected with notice of petitioner's rights. Said bill prayed such injunction; that the court would by its decree declare him entitled to a full one-half interest in and under said contract of August 9th, 1895, with said Sheild and associates, and, upon the basis of said contract, entitled to a full one-half interest in said Richmond Traction Company's franchise, enterprise, property and stock; that specific execution of said contract be decreed and enforced; that all parties defendant be required to answer and to do and perform every act necessary or requisite to the vesting of petitioner's full rights in the premises, and for general relief.

Defendants Demur

8. To this bill the defendants demurred, on the ground of insufficiency and lack of equity, and that petitioner's remedy, if any, was at law.

Amended and Supplemental Bill Filed.

9. Subsequently, by leave of court, petitioner filed his amended and supplemental bill, incorporating the original bill and reciting facts which had transpired since it was filed which rendered the amended bill necessary, to-wit: the subscription to stock, its issue to parties having notice of your petitioner's rights as paid-up stock without any payment whatever therefor, the organization of the Traction Company, the authoriza-

tion, execution and recordation of a mortgage upon its franchise and all its property to secure $500,000 of bonds; all of which proceedings the amended bill charged to have been had and taken after full notice of petitioner's rights, as set out in his original bill, and to be, on several specified grounds, null and void as against petitioner. Said amended bill thereupon prayed for relief by injunction and the appointment of a receiver; that all proper inquiries be had and accounts taken; that, by decree of court, all said recited proceedings be declared null and void and set aside; that the franchise be disencumbered of all the burdens by said proceedings imposed upon it; and that petitioner be decreed his full rights in said disencumbered and restored franchise, and for general relief.

Defendants Again Demur.

10. To the bill as thus amended the defendants filed their demurrer, specifying nine grounds, only two of which, however, need be noticed, for the purpose of this petition, to-wit:

(A.) That there can be no recovery upon the contract relied upon by petitioner, the same being void as contrary to public policy.

(B.) That the remedy upon said contract, if any, is at law.

Bills Amended Under Decree of April 6, 1896

11. Upon the filing of said demurrer, your petitioner, not because he considered his said bills, fairly construed, to be defective, but because they contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making or carrying out of said contract of August 9, 1895, filed his petition asking leave to amend his said original and amended and supplemental bills, in the manner fully and exactly set out upon the face of said petition, so that the amended paragraphs of said bills should read as therein set out. After full argument, the honorable Circuit Court, on

the 6th of April, 1896, Judge Goff sitting, entered an order, from which the following is an extract:

"On consideration whereof, it is hereby ordered that said petition be filed, and that the complainant have leave to amend the said bills, in the particulars set out in his said petition, which is hereby done." (See page 66 of record.)

Your petitioner, however, for the sake of clearness, filed in the Clerk's Office of the Circuit Court, on the 18th day of April, 1896, a complete draft of his amended and supplemental bills, as the same read with all amendments allowed by the aforesaid order of April 6, 1896, which was thereafter designated as "complainant's second amended and supplemental bill," delivering to all defendants copies of the same; and said defendants, on May 4, 1896, filed their demurrer thereto, which was set down for argument, all of which was particularly set out in a preliminary decree entered by the Circuit Court on the 22d day of August, 1896, and the same court, Judge Nathan Goff sitting, by its final decree of August 22, 1896, declared that the cause came on to be heard "upon the defendants' demurrer to the complainant's second amended and supplemental bill; (that is to say, the amended and supplemental bill as amended by the decree herein of April 6, 1896, and in the form filed on the 18th day of April, 1896)."

The last named bill contains, among others, the following allegations and statements of facts, viz:

Extracts from Bill as Last Amended.

"Mr. Hyer agreed that the Traction ordinance should take the place of his Conduit franchise. A candid statement and explanation of this action was to be made before the Street Committee or the Council of the City of Richmond, and Sheild, acting in behalf of himself and his former associates, and also in behalf of your orator and his associates, was to apply to and secure from the Council of the City of Richmond the franchise set out in the said contract of August 9th, 1895, and your orator was to keep the $10,000.00 in Richmond until the 17th day of August,

1895, but subject to the condition set out in the said contract."

* * * * * * *

"At this same interview, said Sheild asked your orator what names of his associates should be inserted in the Traction ordinance. He insisted that he must have your orator's name, and he also desired to use the names of one or two of your orator's associates whom he specified. Your orator could not, at that moment, give definite instructions, but the next day he wired his friends in Richmond, whither Sheild had returned, desiring them to see him, and to have inserted in the Traction ordinance your orator's name and the names of two of his friends and associates who were specified. For a day or two subsequent to the signing of said contract of August 9th, 1895, said Sheild and his associates several times wired your orator as to sundry details of the joint enterprise, especially urging him, by all means, to see that the $10,000.00 on deposit in Richmond, should be detained there until the meeting of the Council—an indispensable service which your orator rendered, although not at the time having received the telegrams referred to. And not only so, but your orator and his associates openly, publicly and fully carried out and performed each, all and every of the promises and covenants of your orator, in behalf of himself and associates, contained in said contract of August 9th, 1895."

"And your orator here takes occasion to state that he applied for and obtained leave of court to amend this, his original bill, by emphasizing the openness, publicity and fairness with which said contract was carried into effect before the City Council and its committees; not because he considered his said bill, fairly construed, as being defective in this regard, but because it contained some loose and careless expressions which might be attempted to be twisted into an admission that something other than proper and legal influences and the utmost candor and publicity was intended or practiced in the making and carrying out of the said contract of August 9th, 1895."

"Your orator, here, and now, states and charges, not only that no such impression was intended to be conveyed by the bill, but that nothing approximating to it in fact, occurred. On the contrary, the entire

history of the Broad street franchise before the City Council and its committees, was a matter of the utmost publicity. The original Conduit Railway franchise of your orator, had been fully considered and discussed before the Council, and by the business community, and the proposed amendments of it were publicly offered, considered, and adopted before the Committee on Streets, and then printed; and when the Traction franchise was applied for, in place of the Conduit franchise, this also was openly done before the same committee; the existence and substance of the contract of August 9th, being generally and fully known by the Council of Richmond, and the public generally and in no way concealed or suppressed, and it being also well and thoroughly understood by the Committee on Streets, that the Conduit people and the Traction people had gotten together, upon the basis of this latter franchise, with the understanding that the two sides should have equal right and representation in the new company."

As petitioner views the matter, his bills, as last amended (page 81–98 of the record) *i. e.*, the bills upon whith the cause was heard, do not contain a word which gives color to the suggestion that the contract upon which he relies, is violative of public policy. Said bills were also amended by the insertion of a direct charge of the utter insolvency of Phil. B. Sheild, which has an evident and important bearing upon the defence that petitioner has a plain, adequate, and complete remedy at law.

Defendant's Demur to Bill as Last Amended.

12. Nevertheless, substantially the same grounds of demurrer—one being added, now ten in all—were interposed to the bills in their final form (pages 114–115 of the record).

The cause was thereupon argued and submitted, pursuant to a preliminary decree, which will be found on pages 118–119 of the record, and, on the 22nd day of August, 1896, the following final decree was entered, to-wit:

Final Decree of Circuit Court

"This cause having been argued before this court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th, and 15th days of May, 1896, upon the defendants' demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill, as amended by the decree herein, of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the court filed its opinion on the 5th day of August, 1896, hereby made a part of the record, holding that the first, second, and third grounds of demurrer assigned by the defendant in their said demurrer, are not well taken and must be overruled; that the fourth ground of demurrer assigned in the said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered.

"Thereupon it is adjudged and decreed:

"First. That the first, second, and third grounds of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, to the second amended and supplemental bill filed by the complainant be, and the same are, hereby overruled.

"Second. That the fourth ground of demurrer assigned by the defendants in said demurrer filed May 4th, 1896, be and the same is hereby sustained, and all bills filed by the complainant are, for this reason, hereby dismissed, with costs to the defendant, to be taxed by the clerk; and the remaining six grounds of demurrer assigned by the defendants are not considered or determined by the court."

Appeal Allowed Assignment of Errors.

On the 6th day of October, 1896, an appeal was allowed your petitioner by said Circuit Court, from its said final decree, to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, the assignment of errors therewith being as follows, caption and signature omitted, to-wit:

"And now, on this 6th day of October, 1896, came the petitioner, L. H. Hyer, plaintiff in the above entitled suit, by Stiles & Holladay, his solicitors,

and says that the decree entered in the said cause on the 22nd day of August, 1896, dismissing all bills filed by the said L. H. Hyer in the above entitled cause, is erroneous and against the rights of the appellant, L. H. Hyer; and said petitioner, L. H. Hyer, appellant, assigns for error, and will contend, in the Appellate Court, that the court below erred as follows:

1

"First. That the court erred in sustaining the fourth ground of demurrer assigned by the defendants in their demurrer filed May 4th, 1896, and, for the reasons assigned in said fourth ground of demurrer, dismissing all bills filed by the complainant, L. H. Hyer. The said fourth ground of demurrer assigned by the defendants in said demurrer, filed May 4th, 1896, is in the following words and figures, to-wit:

"IV. That the contract and agreement set forth in said bill as the sole cause of action of the said complainant is against public policy, and null and void; and no court of equity will enforce the same."

This 4th ground of demurrer will be found on page 115 of the record, and was not copied in the assignment of errors.

"The appellant, L. H. Hyer, respectfully submits and will contend in the Appellate Court that the contract and agreement set forth in his bills filed in this cause, and referred to in said demurrer, were and are perfectly valid and lawful in all respects; that said contract and agreement are in no manner contrary to public policy; that the court below erred in holding said contract and agreement to be contrary to public policy, and therefore null and void, and erred in declining to enforce specific performance of the said contract and agreement, and erred in dismissing the bills filed by L. H. Hyer, or either of them.

2

"Second. That the court erred in sustaining the demurrer filed by the defendants, and erred in dismissing all bills filed by the said L. H. Hyer, or either of them. The contract and agreement set out in the bills filed by the said L. H. Hyer state a plain case for relief in a court of equity; the court below should have overruled all demurrers filed by the defendants herein, and each and every ground of demurrer assigned by the defendants in their said demurrers, and should have retained jurisdiction of this suit and granted the relief prayed by the said L. H. Hyer in his said bills.

3

"Third. That the court in dismissing the bills filed by the said L. H. Hyer in this cause, or either of them, for the reasons set out in the said decree herein of August 22nd, 1896, and the opinion of the court mentioned

herein and made a part of the record; and erred in dismissing the said bills, or either of them, for any reason.

"Fourth. For these and other reasons appearing upon the record of said decree of August 22nd, 1896, your petitioner prays for an appeal from and supersedeas to said decree, and that the said decree may be reviewed and reversed."

Decree of Affirmance by Circuit Court of Appeals.

This appeal was duly perfected and prosecuted and the case was argued in the appellate court, before the Chief Justice and Judges Simonton and Brawley, and submitted at the February term, 1897; and on the 14th day of May, 1897, opinions were filed by Judges Simonton and Brawley, and the following decree of affirmance was entered by the honorable Circuit Court of Appeals:

> "This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs.
>
> "It is further ordered that the mandate of the court issue after the expiration of twenty days from the date hereof."

REAL GROUNDS OF DEFENCE.

Of the ten grounds of demurrer interposed by the defendants to petitioner's bills, as amended by the decree of April 6th, 1896, and in the form filed April 18th, 1896, only two were dignified by notice or mention by the honorable judges of the Circuit Court of Appeals. Of the remaining eight, several were virtually abandoned by counsel in the oral argument. Indeed, it may be said that there are but *two* real questions in the case, and that the demurrer to petitioner's bill must be overruled unless sustained upon one or other of these two grounds.

These questions are as follows:

FIRST.

(A.) Whether it be necessarily contrary to public policy for rival applicants for a Legislative charter or franchise to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

And if the above be answered in the affirmative, then—

(B.) Whether, after a contract contrary to public policy has been consummated, and the franchise or other benefit contemplated in such contract has been secured, and one party has appropriated all the benefit, and the other seeks justice at the hands of the court and a fair division; whether, we say—under such circumstances—a court of equity and of conscience will entertain and approve the plea of the wrong-doer, that the original contract was immoral or invalid?

SECOND.

Whether the complainant has a plain, adequate and complete remedy at law?

Let us consider these questions in the order in which we have just stated them.

I.

Public Policy.

It may be well at the outset to again spread upon the face of this brief the contract under examination—that the court may have it conveniently at hand, and that the view of the eye may lead the thought of the brain.

"NEW YORK, August 9th, 1895.

"S. H. G. Stewart, Esq.,

"40 Wall Street, City.

"Dear Sir:

"We, the undersigned, L. H. Hyer, of Washington, D. C., and Phil. B. Sheild, of Richmond, Va., have this day entered into the following agreement: That both of us being interested in the procuring of a franchise for and the construction of a street railway on Broad street, in the city of Richmond, Virginia, with collateral lines, have made the following agreement: That we hereby bind ourselves, in our own behalf and for our associates, mutually to cooperate one with the other, in securing a franchise for said railway, and to divide equally between us and our associates whatever may be realized from the enterprise, first deducting from said amount whatever actual expenses may have been incurred by either side, such expenses to be paid out of the first money realized from said enterprise.

"It is further agreed between us that the deposit already made with the State Bank of Richmond, at Richmond, Virginia, by Mr. L. H. Hyer or his associates, is to stand and remain intact as it now is for the purpose of securing the franchise aforesaid, subject to any conditions for the withdrawal thereof made by Mr. Hyer with the depositor after the seventeenth day of August, 1895; and further, it is agreed that the application and franchise to be presented to the Common Council of the City of Richmond shall be that of the Richmond Traction Company, for the building of an overhead trolley railway or cable system.

"Among ourselves we will decide what names are proper to be used in the franchise and the policy we will use in procuring the same.

"Yours very respectfully,

"(Signed) L. H. HYER.
"(Signed) PHIL. B. SHEILD."

Circumstances Surrounding The Contract.

The complainant, Hyer, a citizen of Missouri, is a civil gineer; the defendant, P. B. Sheild, residing in the city of

Richmond, an attorney at law; and Stewart and Company, of New York, are Wall street bankers—S. H. G. Stewart, Esq., being the head of the firm. These three parties, acting together, possessed, in an unusual degree, the qualifications and ability requisite to construct an extensive railway system, such ability and qualification as no one, and no two, of the three, possessed. The engineer could lay out and grade the roadbed, advise as to motive power, select rails, material and equipment, and generally superintend the physical construction of the road; but he needed a lawyer to guide and instruct him in respect to the legal questions attending a matter of this magnitude and complexity, and he needed a banker to furnish or raise the money to build and equip the road, or, in the conventional phrase, to "finance the scheme." So, also, the lawyer had need of the engineer and the banker, and the banker had need of the engineer and the lawyer.

The enterprise required the services of all these parties, *i. e.*, a banker, a civil engineer and a lawyer. Stewart and Company were to furnish the money for the enterprise, and, naturally, wished to make it a success, and to so conduct the same as to afford the best security possible for their investment. These bankers could lose nothing by having a civil engineer (and his associates) and a lawyer (and his associates) to work together as partners (to the extent set out in the contract of August 9, 1895), and the fund would be saved the expense of a lawyer by having him thus interested with the civil engineer, while no responsibility would be imposed upon Stewart and Company by such an arrangement. Nothing was more natural under these circumstances than the action of Stewart and Company in advising Hyer and Sheild to enter into the contract of August 9, 1895. It was a plain, business transaction, calculated to promote the interests of all parties. The contract embodied in the letter of August 9, 1895, was free from objection upon its face.

The general head of Public Policy, as applicable to this contract and to the facts and circumstances just above, and in the bill set out as leading up to and following the contract,

divides itself into two questions, the first of which may be thus stated:

Is it necessarily contrary to public policy for two rival applicants for a Legislative charter to unite, and agree to ask the grant of the franchise to them jointly, going openly before the Legislative body and making a full disclosure of their contract and co-operation?

The exact relevancy of the question to the case, and the answer that must be returned to it, are equally obvious. Precisely this is what Sheild and Hyer did; and it is not perceived how, *upon a plain, common-sense view of the matter*, the propriety or legality of their action can be called in question. The highest public policy, as Judge Brawley says, "requires that men should perform their contracts"; but if men cannot be allowed to make a contract such as this, and if, when made, they cannot be compelled to perform it, then there would seem to be an end at once to the liberty and the obligation of human contract.

We do not scruple to declare and to insist that this is the case, and the whole case, upon this branch of it. *Whatever "loose expressions" (and they were nothing more) there may have been in the bill as it stood before the last amendment, capable of being distorted into the semblance or the suggestion of wrong, they were all, after full argument, stricken bodily out; and the complainant was permitted to aver, and did aver, that the utmost candor and publicity was intended and practiced in the making and carrying out of the contract of August 9, 1895; that no impression as to the use of illegal or improper influence was intended to be conveyed, and that nothing approximating to it in fact occurred.*

When the letter above quoted is read in the light of this statement—which, upon demurrer, must be taken to be true—it may almost be said even that reasonable doubt is excluded. Nothing is left in the case, as a plausible basis for discussion, except the bugbear of "withdrawal of competition," and even this is not a plausible basis in this case, since it is left uncertain *in the contract* as to the motive power of the projected rail-

way, and whether it should be applied overhead or underground; and *in the franchise*, as subsequently granted, the city reserved the entire question of motive power, leaving it under the control of the Council, with express reservation of the right to revoke the permission to use electricity as such motive power, or to put any further conditions, restrictions and regulations upon such use. See letter to Stewart, and 5th section of Traction ordinance, page 21 of record.

Opinion of Circuit Judge Sitting in Circuit Court of Appeals.

We do not intend by the last paragraph to indicate any lack of respect for the opinion of the learned Circuit Judge, rendered on the hearing in the Circuit Court of Appeals. See record, pp. 133–141. It is noticeable, however, that his Honor, in his statement of the case, quotes from the bill as it stood prior to amendment; notwithstanding the demurrer, which was argued before him and which he sustained, was a demurrer to the bill as last amended. See order of Circuit Court, pp. 118, 119. He quotes and bases his opinion upon expressions and features which do not exist in the bill as last amended, being amongst the "loose expressions" which the complainant, by his petition filed April 6, 1896, and the orders of the Circuit Court entered thereupon, asked and obtained leave to strike out—*e. g.*, the amended bill does not contain the statement that complainant was satisfied he had the "inside track" and was "master of the situation"; nor that 'the antagonism would probably result in the defeat of both ~~competitors,~~ or that before the franchise was obtained it would be loaded with such onerous and exacting conditions, that no capitalist could be induced to put money in the enterprise.'

The expressions quoted are not only not in the bill as last amended, but the amendments, which struck them out and substituted other phraseology, were made with unusual care and formality—a regular petition for leave to amend being filed, which petition set out in detail the amendments which

were asked to be made and recited the pararagphs which were asked to be amended in the form in which they would exist after amendment, if leave to amend were granted—pp. 66 *et seq.* Not only so, but the order of April 6, 1896, filing the petition and allowing the amendments therein asked, was entered after elaborate argument; and, for the sake of clearness and accuracy, the complainant subsequently filed, in the clerk's office of the Circuit Court on the 18th day of April, 1896, a complete draft of his amended and supplemental bill, as the same read after the amendments granted by the aforesaid order were made—pp. 81 *et seq.* It was to this bill that the defendants demurred, and this is the demurrer which was argued both in the Circuit Court and Circuit Court of Appeals. See order of Circuit Court, pp. 118, 119.

The opinion of the learned circuit judge, sitting upon appeal, makes these quotations from the original bill as it stood prior to amendment, two of them marked by him as quotations (taken from the last clause of paragraph IV, page 4, printed record), and the third taken from paragraph V of the bill, page 5, printed record, as originally filed. Compare the last clause of paragraph IV, page 4, printed record, and paragraph V, pages 5 and 6, printed record, with the same paragraphs as re-written in the petition asking leave to amend at pages 68, 69, and 70, printed record, under the heads of paragraphs IV and V. See, also, the complainant's bill, as last amended, pages 85 and 86, printed record, paragraphs IV and V—*i. e.*, in the form reprinted and again filed April 18, 1896. Stated in brief, the quotations were stricken from the original bill by leave of the trial court. They do not appear in the bill upon which the cause was heard and determined by the Circuit Court.

That part of the decree of the Circuit Court of April 6, 1896, page 66, printed record, bearing upon the subject of amendments to the bill, is in the following words—viz:

"This cause came on this day to be heard on the petition of L. H. Hyer, complainant herein, this day tendered, asking for leave to amend the original, the amended and supplemental bills heretofore filed in this cause; and

was argued by counsel, the plaintiff being represented by Stiles & Holladay, and the defendants by W. W. Henry and James Lyons; on consideration whereof it is ordered that said petition be filed, and that the complainant have leave to amend the said bills in the particulars set out in his said petition, which is hereby done."

The preparatory decree, pages 118 and 119, printed record, immediately preceding the final decree, set out explicitly and in detail the manner in which the complainant's bill had been amended, how the cause stood upon the hearing, and the particular pleading upon which it was submitted to the Circuit Court for decision.

The final decree itself, pages 119 and 120, printed record, also (out of abundant caution) contained the following statement in regard to the pleading, upon which the Circuit Court rendered its decree—viz:

"This cause having been argued before this Court on the 5th, 6th, 7th, 8th, 9th, 11th, 12th, 13th, 14th and 15th days of May, 1896, upon the defendant's demurrer to the complainant's second amended and supplemental bill (that is to say, the amended and supplemental bill as amended by the decree herein of April 6th, 1896, and in the form filed on the 18th day of April, 1896), the Court filed its opinion on the 5th day of August, 1896, hereby made a part of the record holding that the first, second and third grounds of demurrer assigned by the defendant in their said demurrer are not well taken, and must be over-ruled; that the fourth ground of demurrer assigned in said demurrer is well taken and must be sustained, and that having reached the conclusion last stated, the six remaining grounds of demurrer assigned by the defendants would not be considered."

It seems therefore that the learned circuit judge sitting in the Circuit Court of Appeals rested his opinion, certainly in part, upon the allegations of the original bill prior to amendment: that he reached his conclusion against the validity of the contract of August 9, 1895, by taking into consideration certain loose and careless expressions contained in the complainant's original bill, notwithstanding the fact that these loose and careless expressions had been absolutely stricken therefrom by leave of the trial court, after full argument touching the right of the complainant to amend and state the case he expected to prove; that he reached his conclusion upon

consideration of defendants' demurrer to the original bill notwithstanding its amendment, while the trial court declared it heard and determined the cause upon the defendants' demurrer to the complainant's bill as it stood, as last amended, as contradistinguished from the bill as it stood prior to amendment.

It is fair to assume that the views of the learned circuit judge, sitting upon appeal, were based largely upon these quotations and extract, and that he would not have regarded the contract of August 9, 1895, as invalid had he discarded these from his mind and considered the cause upon the defendants' demurrer to the bill as last amended. He laid down a statement of the case upon which he rested his opinion. He based his conclusions upon that statement. That statement, we humbly submit, did not accurately follow the pleadings upon which the complainant's case was heard and determined by the trial court.

In a word, the learned Judge of the Circuit Court, sitting on appeal, practically and substantially over-ruled the decrees of the lower court allowing amendment of the bill, and, after having so over-ruled the decrees of the trial court in this regard, went back to the bill as originally filed by the complainant and rested his opinion upon a demurrer to that bill as contradistinguished from the bill as last amended.

The fact that the learned circuit judge quoted from the original bill and based his opinion, in part at least, upon statements which had been stricken therefrom by leave of the trial court, indicates that he did not rest his opinion upon the defendants' demurrer to the bill as last amended; that he did not declare upon demurrer (and as a legal question) that the complainant had not stated a case in his bill, *as last amended*, which entitled him to recover if the facts therein stated could be established by proof at a hearing on the merits.

As to that portion of the opinion of the learned circuit judge, which treats of the arrangement between Hyer and Sheild as tending to lessen or withdraw competition, in which the public was interested, we are content to rest the matter upon a comparison of the opinion of the learned circuit judge

with that of the able district judge, pages 142 to 145, printed record, and the discussion of this point, and the authorities cited upon it later in our brief.

Opinion of District Judge Sitting in Circuit Court of Appeals.

Upon the question whether the contract between Sheild and Hyer is one of the class of contracts ordinarily condemned and annulled by the courts as violative of public policy, the learned District Judge, in his opinion, says:

"* * * Hyer and Sheild were rival promotors, each seeking from the City Council of Richmond a franchise for a street railway on Broad street, and both looked to Stewart, a banker in New York, for the money to carry out the enterprise.

"Hyer had already obtained a franchise from the Council, and was asking for some amendments thereto. Stewart, fearing that the continued rivalry might result in the defeat of both or in the obtaining of a franchise of such nature that capital would not embark in it, advised the parties to come together, and they united in an agreement for mutual co-operation and for an equal division of whatever profits were realized. The agreement does not on its face bear any of the *indicia* which mark a dishonest purpose. It does not show, nor can it be reasonably inferred, that any sinister, extraneous or corrupting influences were to be brought to bear upon the City Council of Richmond to superinduce the granting of the franchise, nor is it alleged that any improper means were to be used to accomplish it, and thus it is clearly distinguished from all that class of cases where the courts have held contracts void as reeking with corruption, such as using official influence for private gain, securing public office for pay, retiring from competitive candidacy under agreements to divide fees, securing public contracts upon like terms, or bargains for lobbying services to influence legislation. None of those elements enter here, and the sole ground upon which the decision rests is that the agreement was calculated to diminish competition for the obtaining of the franchise."

Upon the question whether the coming together of Sheild and Hyer and their agreement to ask the grant of the fran-

chise to them jointly, was calculated to lessen competition for said franchise, to the disadvantage of the public and of the city of Richmond, the learned District Judge further says:

"It is not contended, not can it be assumed, that Hyer or Sheild, either or both, had such control or monopoly of the building of street railways that they could by combination put up the price or demand an unusual or unreasonable franchise or embarrass the city of Richmond, and thus injure or jeopardize the public interest, either by their action or non-action. A rule that might be justly applicable to a kind of business which could not be restrained to any extent whatever without prejudice to the public interest ought not to be arbitrarily extended so as to interfere with that freedom of contract which is a fundamental right."

"The franchise in question was not a thing that was put up at public auction and bound to go to the lowest bidder, where a combination to chill the bidding might be held to be in contravention of the public interest. The City Council of Richmond, faithful, as it must be assumed, to its obligations to the public, was not bound to give the franchise to this or any other combination except upon such terms as it chose to annex, and there was no agreement for any corrupting influences to affect its action. An honest co-operation between two parties to effect an object which neither could accomplish by itself is not forbidden, although, in a sense, that might tend to lessen competition. There is a competition that kills, as there is a combination that saves. Competition in itself is not invariably a public benefit, and to hold a contract void because its tendency may be to defeat competition, it must appear that the benefit to be derived from it is certain and substantial, and not theoretical and problematical. The rivalry of impecunious promoters in the obtaining of a franchise for an important public work requiring large capital for its fulfillment is not of such certain advantage to the public that the law should be invoked to prevent its suppression. When such men discover a field where capital can be profitably employed, and, seeking its aid at the same source, are informed that the money necessary to develop it can only be obtained upon the condition of their joint co-operation, and they voluntarily combine in furtherance of the enterprise, there can be no objection to it if it is done honestly and in good faith. Unless such a contract, either on its face or viewed in the light of the circumstances surrounding it, clearly discloses the fact that improper means and influences are to be used to accomplish

the desired end, it should be sustained. 'If there is one thing,' says Sir George Jessel in a recent case, 'which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice."

"All presumptions are in favor of the legality of contracts —all reasonable intendments are indulged to support them— if capable of a construction that will uphold and make them valid, they are not to be held illegal unless the circumstances are so strong and pregnant that no other reasonable conclusion can be drawn from them, for intention to violate the law is not to be presumed."

The above extracts from the opinion of the learned District Judge suggest, and the suggestion, as we shall show, is abundantly borne out by the authorities—that the fundamental principles, in the light of which this question must be examined and determined, are the following, to-wit:

FIRST. The broadest public policy is in favor of the liberty of contract.

SECOND. The strongest presumption is in favor of the validity of contract, and therefore,

THIRD. The greatest indisposition exists on the part of the courts, to hold a contract void as against public policy, upon demurrer; and this will be done only in the clearest possible case.

FOURTH. Contracts tending to the withdrawal of competition, are not necessarily invalid as against public policy, but each case must be examined and determined in the light of its peculiar circumstances.

The following are some of the principal authorities which, in order to avoid excessive subdivision, we have thrown together in two or three groups, and first:

Presumption in favor of the Validity of Contracts Assailed as Contrary to Public Policy.

L. R. 19 Eq. Cas. 462.

Subject: Presumption in favor of Validity of Contract.

In Printing and Numerical Registering Company v. Sampson, L. R. 19 Equity Cases 462, Sir George Jessel M. R. at page 465 said: * * * * * *

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract. Now, there is no doubt public policy may say that a contract to commit a crime or a contract to give a reward to another to commit a crime is necessarily void. The decisions have gone further, and contracts to commit an immoral offense or to give money or reward to another to commit an immoral offense, or to induce another to do something against the general rules of morality, though far more indefinite than the previous class, have always been held to be void. I should be sorry to extend the doctrine much further. I do not say there are no other cases to which it does apply, but I should be sorry to extend it much further. * *"

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2 Bing., 229

Subject: Presumption in favor of Validity of Contract.

Richardson v. *Mellish*, 2 Bing., 227 (9 E. C. L., 391). Contract to exchange commanders of East India Company's ships: defendant repudiating the contract, plaintiff sued in assumpsit for breach. Illegality of contract being raised in defense, the Court held contract legal, all the judges (Best, C. J., Park and Burrough, Js.) concurring.

On page 397 (9 E. C. L.) Best, C. J., said:

"This brings me to the third question, whether there is any illegality in the transaction. I agree with the argument put to us, that if the defendant has clearly and satisfactorily made out by evidence a fraud in this case, or if it appears by the record in this case that this is a corrupt agreement, or that this agreement is manifestly in contravention of public policy,—whatever we may say as to the raising this objection, the objection must prevail. I am of opinion he makes out neither: I am of this opinion, giving the fullest effect to the argument urged. When I come to consider the record, I see not the least pretence for this objection. It is said it is a fraud on the East India Company, and that it is a fraud on the co-owners. It cannot be a fraud on the East India Company, for they are apprised of the whole transaction. * * * *

"We have heard much of this being a contravention of public policy, and that on that ground it cannot be supported. I am not much disposed to yield to arguments of public policy. I think the Court of West'minster Hall (speaking with deference as an humble individual like myself, ought to speak of the judgments of those who have gone before me), have gone much further than they were warranted in going in questions of policy: they have taken on themselves, sometimes to decide doubtful questions of policy; and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which ought to enter into the judgment of those who decide on questions of policy. I therefore say it is not a doubtful matter of policy that will decide this, or that will prevent the party from recovering:—if once you bring it to that, the plaintiff is entitled to recover; and let that doubtful question of policy be settled by that high tribunal, namely the Legislature, which has the means of bringing before it all the considerations that bear on the question, and can settle it on its true and broad principles. I admit, that if it be clearly put upon the contravention of public policy, the

plaintiff cannot succeed: but it must be unquestionable,—there must be no doubt:— * * * * * * * "

And on page 400, this distinguished jurist, (Best C. J.), speaking of the decisions in *Blackford* vs. *Preston*, and *Card* vs. *Hope*, especially the latter, said: * * * * *

"There are expressions used by the Chief Justice in that case which seem to bear on the present: but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. The manner in which he is arguing is not the thing: it is the principle he is deciding. If ever I could have imagined it could have been extended to such a case as this, I would have protested against, though I could not have prevented the decision. I would in my place have protested against it, for I should have seen the injustice and confusion to which such a doctrine would have been liable to be extended. * * * * * * * "

And on page 403, Burrough, J., said: "* * * * I, for one, protest, as my Lord has done, against arguing too strongly upon public policy: it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail. * * *

"As to the point of public policy, a great deal has been said, many cases have been mentioned, and in *Blackford* vs. *Preston*, a great number of general phrases were made use of by the learned judge. But you ought not to govern courts of justice by general expressions used in the administration of the law. They may have some weight, but they ought not to govern: you must look to what the point of decision was. I only need read the point of decision from the digest of the case, which puts it out of question that it has anything to do with this case. The Digest says, 1 Moore Dig. 361, "A sale (by the owner) of the command of a ship employed in the East India Company's service, without the knowledge and against the by-laws of the company, is illegal: and the contract of sale cannot be the foundation of an action. * * * * "

4 M. & W. (Exch.) 653.

Subject: Presumption in favor of Validity of Contract.

In the case of *Lewis* vs. *Davison*, 4 M. & W. (Exchequer), 653, opinions were delivered by three of the Judges. They are as follows:

"Lord Abinger, C. B.—I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law. But it does not appear to me that that is necessarily the effect of the agreement in the present case; and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act, the contrary is the proper inference. Here the contract is in the alternative: either James Davison is to be surrendered to the custody of the sheriff, or the defendant is to pay the amount of the notes. It must be presumed that James Davison was to be arrested by lawful means only; if the defendant cannot cause that to be done, he is himself to pay the money secured by the notes. The contract, therefore, is not necessarily unlawful, and cannot receive such a construction."

"Parke, B.—I am of the same opinion, that this declaration is sufficient. The case of *Allen* v. *Rescous* is wholly different; that was the case of a contract to beat another, which was plainly unlawful. Here the defendant has in effect undertaken to induce James Davison to consent to his being arrested, —which implies that he will obtain his consent by lawful means,—or in default of his surrendering him, has made himself responsible on the notes. There is nothing necessarily unlawful in such an agreement."

"Alderson, B.—I also think that this contract is not necessarily unlawful. It may well bear the construction, that the defendant will arrest James Davison for a debt due to himself, and thus enable the sheriff to detain him for the debt due to

the plaintiff. And if it will bear a legal construction, that should certainly be put upon it."

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31 L. T. N. S. 593

Subject: Presumption in favor of Validity of Contract.

In *Barton* v. *Muir*, 31 L. T. N. S. 593, the syllabus is as follows:

"In order to deprive a plaintiff of his right to relief in equity on the ground of illegality in the transaction in respect of which such relief is sought, there must be such a degree of illegality as is free from all doubt.

"In a case in which the appellant sought to have it declared that the respondent held certain lands, which the appellant had purchased in his name, as trustee from him, but his bill was dismissed on the ground that the agreement between the parties was 'a fraud in effect on,' 'contrary to the policy of' and 'by necessary implication expressly prohibited by' a colonial statute relating to the alienation of land:

"Held (reversing the judgment of the Court below) that a constructive prohibition was not sufficient in order to annul such a transaction, but that there must be no doubt whatever as to the construction and effect of the statute in question."

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6 Bing., 163.

Subject: Presumption in favor of Validity of Contract.

In *Walsh* v. *Fussell*, 6 Bing. 163 (19 E. C. L. 40), Lord Chief Justice Tyndall (pronounced by the British House of Lords in the great Nordenfeld case, to be one of the greatest and soundest judges that ever sat upon the English bench, especially in cases of this general character) in delivering his opinion, said:

"* * * * It is not contended that the covenant was illegal on the ground of the breach of any direct rule of law,

or the direct violation of any statute; and we think to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. * * * * "

21 Fed. R. 299—301.

Subject: Presumption in favor of Validity of Contract.

In *Swann* v. *Swann* 21 Fed. R. 299-301 the contract under construction was objected to on the ground that it was contrary to public policy as entered into on the Lord's day. The Court overruled the defense and in so doing (on page 301) said:

"* * * No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this State, or injurious to the morals of its people. Vague surmises and flippant assertions as to what is the public policy of the State, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which courts must appeal to determine the public policy of a State. The term, as it is often popularly used and defined, makes it an unknown and variable quantity,—much too indefinite and uncertain to be made the foundation of a judgment. The only authentic and admissible evidence of the public policy of a State on any given subject are its constitution, laws, and judicial decisions. The public policy of a State of which courts take notice, and to which they give effect, must be deduced from these sources."

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70 Fed. R. 201.

Subject: Presumption in favor of Validity of Contract.

In the case of *Hartford Fire Insurance Co. et al.* v. *Chicago M. & St. P. Ry. Co.* decided by the Circuit Court of Appeals

for the Eighth Circuit, October 7th, 1895, reported in 70 Fed. Reporter 201-209, Sanborn Circuit Judge on page 207, said:

"The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. U. S. v. Trans Missouri Freight Association, 7 C. C. A. 15, 82, 58 Fed. 58; Printing & Registering Co. v. Sampson L. R. 19 Eq. 462; Tallis v. Tallis 1 El. & Bl. 391; Rousillon v. Rousillon, 14 Ch. Div. 351, 365; Stewart v. Transportation Co. 17 Minn. 372, 391 (Gil 348); Marsh v. Russel, 66 N. Y. 288; Phippen v. Stickney, 3 Mete. (Mass) 384, 389. * * * * * * *"

22 Kans., 692; 8 Kans., 542 6; 2 [illegible] & Johns., 68; 24 Gratt., 16; 26 Iowa, 191; 117 U. S. 576; 89 N. Y., 384.

Subject: Presumption in favor of Validity of Contract.

McBratney vs. *Chandler*, 22 Kans., 692–3, holds: "There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having entered into, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is matter of defence." His Honor, Judge Brewer, who decided this case, so ruled, not only with regard to a contract *for procuring legislation*, but, in 8 Kansas, 542–546, with regard to a contract providing *for the use of money in procuring legislation*; and also in this 22 Kansas case, that if there was any evidence tending toward the validity of the contract, the case must not go off on demurrer, but be left with the jury. See, also, *Aubin* vs. *Holt*, 2 Kay & Johns, 68, holding that a contract only savoring of illegality, must be specifically enforced; *Bell & Mann* vs. *Dozier*, 24 Gratt., 16, that to make a contract contrary to public policy, it must be directly and plainly so; *Richmond* vs. *Dubuque & S. C. Rg. Co.*, 26 Iowa, 191–202: "The power of courts to declare contracts void, as being against public policy, is a delicate and unde-

fined one, and like the power to declare a statute unconstitutional, should be exercised only in a case free from doubt." *Hobbs* vs. *McLean*, 117 U. S., and *Lorillard* vs. *Clyde*, 89 N. Y., 384; that "Where a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted." "An agreement will not be assumed to be illegal, when it is capable of a construction which will uphold and make it valid."

It is noticeable that the case of *Hobbs* vs. *McLean* cites with approval *Lorillard* vs. *Clyde* as authority for the position just stated, in which connection the following extract, from the opinion in *Lorillard* vs. *Clyde*, is most pertinent and suggestive: "I can see no objection, on the score of public policy, to an agreement between parties about to form a corporation, agreeing upon the general plan, upon which it is to be organized and conducted, so long as nothing is provided for inconsistent with the provisions of the statute, or immoral in itself. An agreement providing for the details of management made in advance, might not be binding upon the trustees of the corporation when organized, but such an agreement is not illegal. In this case, as the complaint shows, the agreement upon which the guarantee was predicated, has been carried out. Wm. P. Clyde & Co. have had the management of the corporate business. There has been no failure of consideration for their promise. On demurrer, all reasonable intendments are indulged, in support of the pleading demurred to"—page 389.

11 Bush (Ky.), 306.

Subject: Presumption in favor of Validity of Contract.

In *Bibb* vs. *Miller, &c.*, 11 Bush (Ky.), 306, the first two paragraphs of the syllabus are as follows:

"1. *In pari delicto.*—It is the benefit of the public, and not the advantage of the defendant to an action, that is to be considered in cases in which one or more of several parties *in pari delicto* rely for defense upon the illegality of the transaction out of which the claim arises.

"2. *In such cases the presumption is in favor of the transaction*, and if it be susceptible of two meanings, the one legal and the other not, that interpretation will be put upon it which will support and give it operation. (2 Chitty on Contracts, page 977, 6 Q. B., 989; 4 M. & W., 654)."

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65 Vt., 431.

Subject: Presumption in favor of Validity of Contract.

Barrett vs. *Carden*, 36 Am. St. R., 876 (65 Vermont, 431). Action of debt upon a bond not to contest a will. Contract held not invalid.

Start, J., in delivering the opinion of the Court, pages 877–8, said: "The defendant insists that the alleged undertaking of the defendant is contrary to public policy, and that for this reason the bond should be declared void. Courts will not declare contracts void on grounds of public policy except in cases free from doubt, and prejudice to the public interest must clearly appear before the Court is justified in pronouncing an instrument void on this account. In *Richmond* vs. *Dubuque, &c., R. R. Co.*, 26 Iowa, 191, it is said 'that the power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt.' In *Kellog* vs. *Larkin*, 3 Pinn., 123, 56 Am. Dec., 164, Howe, J., said: 'He is the safest magistrate who is more watchful over the rights of the individual than over the convenience of the public, as that is the best government which guards more vigilantly the freedom of the subject than the rights of the State.' In *Richardson* vs. *Mellish*, 2 Bing., 229, 9 Eng. Com. L., 557, Sir James Burrough said: 'I protest, as my Lord has done, against urging too strongly upon public policy: it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never urged at all, but when other points fail.' * * *"

61 N. H. 26.

Subject: Presumption in favor of Validity of Contract.

In *Southegan National Bank* v. *Wallace, Adm'r*, 61 N. H., on page 26, the Court said:

"The presumption of law is in favor of contracts; illegality will not be presumed, and if a contract is susceptible of two meanings, one legal and the other illegal, it is elementary that courts will adopt the former and not the latter, so that, if practicable, the contract may be rendered operative. Hence, if an agreement like the one here is entered into for the performance of an act which may be effected by lawful or unlawful means, the law will presume that the former was contemplated by the parties, and that what was done under it was legally done, until the contrary appears."

3 Pinney (Wis.), 136.

Subject: Presumption in favor of Validity of Contract.

In the case of *Kellog* v. *Larkin*, 3 Pinney, 123, the Supreme Court of Wisconsin, speaking through Howe, J., at p. 136–7:

"I by no means intend to deny the right or the propriety of judicially determining, that a contract which *is* actually at war with any established interest of society is void, however individuals may suffer thereby, because the interest of individuals must be subservient to the public welfare. But I insist that before a court should determine a contract which has been made in good faith, stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the State, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical. And I submit that he is the safest magistrate who is more watchful over the rights of the individual, than over the convenience of

the public, as that is the best government which guards more vigilantly the freedom of the subject, than the rights of the State."

And now, in the light of the authorities, applying the principles adduced from them and distinguishing the contract under construction in this case from the various classes of contracts which have been held void by the courts as violative of public policy, we submit that

The Contract of August 9th, 1895, as Set Forth in Complainant's Bills as Last Amended, is not Contrary to Public Policy.

The general rule, which invalidates contracts violative of sound public policy, is familiar and requires no more definite statement—indeed it may be said to admit of none. It is, however, in practice a question of limitations and applicability. It is both impossible and unnecessary to cite and to discuss the almost numberless authorities bearing upon this question.

A very general analysis and classification will eliminate most of them, as not calculated to shed any light upon the question of the validity or invalidity of the contract under discussion—e. g.:

Class 1st. Cases reeking and putrid with corruption, such as the *Oscanyan* case, 103 U. S., 261, where one officer of a government, confessedly for pay, used his personal influence with another to control his decision of a public matter of vital interest to the common government; or the case of *R. & D. Extension Company* vs. *The Woodstock Iron Company*, 129 U. S., 642, where a fiduciary officer used $100,000 of the funds of one company to benefit another in which he was interested.

Class 2d. Cases involving action not quite so rank with moral taint, yet such as every right-minded man would naturally shrink from, such as securing public office for another or retiring from competitive candidacy therefor—for pay or

upon condition of sharing the fees and emoluments; *Meguire* vs. *Corwine*, 101 U. S., 108; or securing public contracts for parties upon the like terms: *Tool Co.* vs. *Norris*, 2 Wall., 45.

Class 3d. Cases of express bargain for "lobby services" to influence legislation, such as the *Baltimore & Ohio* case, 16 Howard, 325.

Class 4th. Cases of agency to secure or affect legislation, with compensation contingent upon success; most of the authorities employ the expression "high contingent compensation;" see *B. & O.* case and many others.

Class 5th. Cases bargaining, for compensation, for the withdrawal of competition in which the public is interested.

IT IS CERTAINLY safe to say that our case does not fall under either the 1st, 2d, or 3d class. Being anxious to assume nothing, we will, for the present, reserve the question as to locating it within the 4th or 5th class.

Another and somewhat parallel line of classification, of contracts for services concerning legislation, which may tend further to elucidate this matter, is the collation of such features of these contracts, as the Courts have held influential, if not determinative, as to their validity—*e. g.*

1. Access to legislative bodies, in advocacy of proposed legislation, is most freely accorded to parties originally and personally interested for or against such legislation; but, is also allowed to parties interested, for compensation only, provided their character as hired agents is made known. *Marshall* vs. *B. & O. R. R.*, 16 How., 335.

2. Contracts contemplating open advocacy and discussion before legislative bodies and committees are usually held valid; those contemplating private approach to, or the exercise of personal influence upon individual legislators, void.

Upon this ground, contracts for services as counsel have

been generally approved and validated, those for "lobby services" disapproved and held void.

3. Contracts contemplating the use of money, in legitimate expenses such as procuring information, printing, &c., are held valid—for purposes of bribery, direct or indirect, *e. g.*, treating, suppers, any sort of entertainment of legislators, void.

In the light of these principles, in support of which, if need be, abundant authority might be cited, it is clear that the case at bar does not fall within *Class 4th* above described. The contract of August 9th, 1895, provides for no contingent compensation—indeed, properly speaking, it does not provide for any compensation at all.

It is a misuse of language, to speak of "contingent compensation" to a man who simply proposes and presses his own case or project, with the chance of failure or success, which every man must encounter in every enterprise he undertakes.

We might perhaps safely have assumed thus much, for no serious effort was made in oral argument, in the lower courts, to assimilate the case at bar to any class of contracts reprobated or held void as violative of sound public policy, save and except the 5th and last class—viz., contracts providing for *the withdrawal of competition in which the public has an interest and by which it is likely to be benefited.* We are confident, however, that our contract does not fall even within this class; and for the following reasons:

(*a*) The principle is applied most freely to biddings for property at public sale.

(*b*) It is not applicable even there, unless the motive and purpose are impure or immoral—*i. e.*, where the intent of the contract is to lessen competition, in order to effect a purchase of property at an inadequate price.

(c) It is impossible to conceive of such an agreement being made or carried into execution as affecting either legislation

or bids for property, where, as in the case at bar, there is a free exposition of the entire scheme and exposure of the contract itself before the persons conducting the sale or composing the legislature.

(d) Lastly, there was, and there could have been, no such withdrawal of competition, to the detriment of the public, in this case: for, whatever inferences may be legitimate upon demurrer, as to the character of the "Conduit" franchise (either the original or the amended one) with reference to the power to be used or the mode and place of its application, underground or overhead; certainly, as to the "Traction" franchise, the City Council held the decision of the entire matter in their own hands. See paragraph "Fifth" of the latter franchise, top of page 30 of the bill.

The *legal presumption, as we have seen, is in favor of the validity of contracts.* Not only does such presumption exist, but it is so strong that, if two constructions of a contract be possible, by one of which it will be thus avoided, and by the other it may stand, that construction must be put upon it which will make it valid.

Is it too much to say, that under this state of the law, and upon this entire case, it is clear that the contract under discussion—providing simply that two sets of applicants for a franchise should unite to form one Company, going openly before the City Council and its committees, there producing their contract and their proposed franchise, explaining and exploiting their entire plan and arrangement, telling their story and making their arguments—is it not clear we say, that such a contract is not, and cannot be void as contrary to public policy?

In the lower Courts, council for the defendants laid down as the basis of their defense under "Public Policy," a quotation from *Pomeroy's Equity Jur.*, Sec. 945. The quotation is in the following words:

"Where a private statute or a statute directly affecting private rights, is pending before the Legislature, a secret agreeement between parties interested, which if disclosed, might have determined the action of the Legislature, as, for example, an agreement by one party to withdraw his opposition in consideration of a compensation to be paid by the other, has been held a fraud upon legislation, and therefore void. The doctrine finds its most important application in dealing in contracts for the purpose of procuring legislation. All agreements, in every possible form, for the purpose of securing or using personal and private influence with members of a Legislature, or of securing or using labor and services with legislators privately, personally and individually, for the object of obtaining legislation, either public or private, are in the highest degree contrary to the fundamental theory of free legislative action."

It is interesting to note the number of limitations or qualifications embodied in this short paragraph, *e. g.*, the reprobated agreement must be "secret"—it must be such as "if disclosed, might have determined the action of the Legislature"—if an agreement by one party to withdraw opposition, it must be "in consideration of a compensation to be paid by the other"—if a contract for the purpose of securing legislation, it must provide for "securing or using private and personal influence with members of the Legislature," or, "labor and services with legislators privately, personally, and individually." Your honors will observe that no one of these limiting or qualifying features, which seem to be essentially characteristic of contracts held invalid as contravening public policy, characterizes the contract in the case at bar. It is also a noticeable feature of the utterances of Courts and text writers upon this subject, that clauses of condemnation apparently very comprehensive and sweeping, are frequently narrowed and limited by the context, *e. g.*, in the above paragraph, the statement of the author is not condemnatory, as might upon careless reading first appear, of "all contracts in every possible shape, for the purpose of procuring legislation," but only of such as are "for the purpose of securing or using private and personal influence with members of a Legislature," or, "labor and services with legislators, privately, personally and individually."

It may serve further to emphasize these and kindred points, to make a few quotations from:

Decisions Sustaining Contracts Assailed as Against Public Policy.

140 N. Y. 382.

Subject: Decision sustaining Contract assailed as against public policy.

In the case of *Katherine F. Chesebrough, as Administrator, etc., Respondent*, v. *Daniel D. Conover, Appellant*, 140 New York, 382, an action was brought to recover for services rendered by Julius F. Chesebrough, plaintiff's intestate, under a contract with defendant. The decision of the trial court was in favor of the plaintiff, which was affirmed by the intermediate Appellate Court. The case was then taken by the defendant to the Court of Appeals of New York, and the latter court, in affirming the rulings of the lower courts (pages 385, 386, 387), said:

"It appears from the complaint in this action that prior to 1879 the defendant had become interested in the construction of a railroad through 42d street, in the City of New York, and that Mr. Chesebrough, who may be spoken of as the plaintiff, had rendered for him various services in and about

the proposed road, and he alleges in the complaint that on the 7th day of March, 1879, the defendant agreed with him that if he would assist him in obtaining the rights, privileges and franchise, and authority for the building of the proposed road, and draw for him certain papers, acts and resolutions to be presented to parties, to the Legislature and the Common Council, and write certain letters and see certain parties, and go to Albany and use arguments, he would give plaintiff, as soon as said extension of said railroad through 42d street was in operation, $10,000 of the bonds and $10,000 of the capital stock of the Company for the services to be rendered and the services already rendered by him; that, at the request of the defendant, he drew certain proposed acts to authorize the construction and operation of the railroad through 42d street, and also drew various other proposed acts of the Legislature and other papers, and rendered certain other services mentioned in the performance of the contract alleged, for all of which services he demands judgment for $10,000 damages. The defendant, by his answer, put in issue the material allegations of the complaint as to the contract and the services claimed to have been rendered in pursuance thereof. Upon the trial, the plaintiff gave evidence tending to prove the contract and the rendition of the services as alleged. There the defendant claimed that the services consisted, in part at least, of personal and private interviews with members of the Legislature for the purpose of affecting pending legislation in the interest of the defendant, and that, therefore, the contract was against public policy and void, and that the defendant could not recover for the services; and upon his request the trial judge charged the jury as follows:

"That even if the jury find as a fact that there was a contract between the plaintiff and defendant, but that it was part of such contract that the plaintiff, if requested, would go to Albany and see some member of the railway committee when one of the bills testified to was before such committee, and talk to him privately to further said bill so as to have the bill reported and passed along, or so that the bill could be passed, and that the plaintiff did talk with one or more members of such committee privately for such purpose, then the defendant is entitled to a verdict.

"That even if the jury find as a fact that there was a contract between the plaintiff and defendant, but that it was part of such contract that the plaintiff should, if requested, have personal and private interviews with members of the Legislature, having in view as one of their objects the furthering of any bill pending in the Legislature, or a committee thereof, so that the same could be reported by such committee and passed, then the jury need consider no other question, but must render a verdict for the defendant."

"Notwithstanding the instructions thus given to the jury, they found a verdict in favor of the plaintiff; and it is now claimed by the learned counsel for the defendant that upon the undisputed evidence the verdict should have been in favor of his client."

"It is conceded by both parties that the judge properly instructed the jury, but they differ as to the force and effect of the evidence. It is not to be denied that upon the evidence the case was a very strong one for the defendant, and that the jury, with the power to weigh the evidence and draw inferences therefrom, could, under the instructions given, have found a verdict in his favor. But we think the jury could take a different view of the evidence, and find that the contract between the parties was not condemned by the rules of law, and that no services were rendered by the plaintiff in violation of the public policy embodied in the instructions given by the judge to the jury. If the plaintiff was employed to render what are commonly called lobby services in procuring the legislation desired by the defendant, then he should have been defeated in his action. Such contracts are condemned as against public policy, and the rules applicable to them are laid down in many decisions (*Chippewa, etc., R. R. Co.* vs. *Chicago, etc., R. R. Co.*, 75 Wis., 248; *Frost* vs. *Inhabitants of Belmont*, 6 Allen, 152; *Harris* vs. *Roof's Ex'rs*, 10 Barb., 489; *Sedgwick* vs. *Stanton*, 14 N. Y., 289). Here the jury could find that the plaintiff was not employed to render, and that he did not render lobby services. He was not a lobbyist, and he had no acquaintance or influence with any member of the Legislature, and it does not appear that he had any peculiar facilities for procuring legislation. The jury could find from the evidence

that he was employed by the defendant to draw legislative bills and to explain them to members of the Legislature, and to procure their introduction into the Legislature and nothing more. It does not appear that he asked or solicited any member of the Legislature to vote for the bills, or that he did anything except explain them, and request their introduction; and so much he could do without violating any public policy. It must be the right of every citizen who is interested in any proposed legislation to employ an agent for compensation payable to him, to draft his bill and explain it to any committee or to any member of a committee, or of the Legislature, fairly and openly, and ask to have it introduced: and contracts which do not provide for more, and services which do not go farther, in our judgment, violate no principle of law, or rule of public policy."

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151 Mass. 99.

Subject: Decision sustaining Contract assailed as against public policy.

In *Barry* v. *Capen*, 151 Mass. 99, an action was brought by the plaintiff, a member of the bar, upon a special contract to pay one thousand dollars for professional services. The case was tried in the lower court by the judge without a jury, and the finding of the court was in favor of the plaintiff. On pp. 100-102, the court said:

"The plaintiff's statement of the contract is as follows: The defendant came to his office, and said that he had a case which he wished the plaintiff to attend to: that there had been appropriated twenty-five thousand dollars for Talbot Avenue, which went through the defendant's hands; and that he wanted to have it laid out as soon as possible. The plaintiff asked what the defendant wanted him to do. The defendant answered, 'I want you to appear before the Street Commissioners and advocate the laying of it out, and the terms of damages.' He then stated what damages he thought he ought to get, and offered the plaintiff everything he got over ten thousand dollars. The plaintiff declined to do business in that way, where-

upon the defendant said, 'You go and get as much as you can, and I will pay you a thousand dollars for it.' To this the plaintiff assented."

* * * * * * *

"The plaintiff did not draw the petition in the case. He was not present at the hearing after the order of notice of intention to take the property. He did not do some other things which it might be supposed that one who really was engaged as counsel would do. On the other hand, from December to January, that is, before public proceedings were begun for laying out the street, he went at least three times a week to see the Street Commissioners. At this time he was chairman of the Democratic City Committee. We perceive the inferences which a jury or the judge in this case might have drawn from these facts, and we appreciate the argument addressed to us upon the evils of corruption, and the invalidity of contracts tending to induce it. But we cannot say that there was not some evidence of a legal contract. We cannot say, as matter of law, that the chairman of the committee of a political party cannot practice his profession—the law—in the City Hall, as well as in the courts. We cannot say that the contract appears, as matter of law, to have contemplated the use of improper influence, or to have necessarily tended to induce it. The words in which the contract is said to have been made did not disclose such a tendency on their face. The political position of the plaintiff, and what was done, are only evidence of what was expected, and are not conclusive that it was expected. What was done moreover was not necessarily improper, even in the particulars mentioned. We have not mentioned those services rendered which were not open to question."

46 Mo. 306.

Subject: Decision sustaining Contract assailed as against public policy.

In *Workman* v. *Campbell*, 46 Missouri 306, the 3d paragraph of the syllabus is as follows:

"3. Contracts.—Consideration, legality of—depot, location of—railroad company.—A contract to pay a given sum of money to one who should present a petition or proposition to the directors of a railroad company for the location of the depot on certain land, the money to be paid on location of the depot and completion of the road, is not void as against public policy unless it appear that sinister, extraneous, or corrupting influences were brought to bear on the Company to superinduce the location."

On pp. 307, 308 the Court said:

"Plaintiff brought his action in the Johnson County Circuit Court to recover the sum of $200, together with interest, on a subscription made by the defendant. The petition, in substance, sets out that by the subscription paper the defendant, with others, bound himself to pay the amount subscribed to Jno. A. Pigg, Jr., or whoever might present a petition or proposition to the Board of Directors of the Pacific railroad, to be used in securing the location of a depot on the land then owned by Samuel Workman or James McKehan: the money to be paid whenever it was ascertained that the location was made and the road finished to the depot; that the land mentioned in agreement, upon which the depot was to be located, was adjoining the town of Knobnoster; and that, in considera- of the subscription, plaintiff did present to the Board of Directors a petition and proposition for the location of the depot upon the lands mentioned in the subscription paper, and that he expended a large amount of labor and money, to-wit: one thousand dollars, in order to secure the location of the depot, and did secure thereby the location; that the railroad was, on the 2nd day of May, 1864, completed to the said depot, and has ever since been in use to and for the same, of which the defendant was duly notified, and that Pigg assigned the subscription to plaintiff."

"To this petition a demurrer was filed, for the reasons: First, that there was no sufficient consideration stated to support the promise alleged to have been made by the defendant; second, because it was a promise to pay money for influencing public officers, whose duty it was to select a depot with reference to the public convenience and accommodation; third, because the agreement was against public policy; and fourth, because it was an agreement for the exertion of a secret influence and power over the affairs of the corporation, not generally known to the public."

The Circuit Court gave judgment sustaining the demurrer and this judgment was affirmed by the District Court. The decision of the District Court was based on a ground not raised by the demurrer.

The Supreme Court of Missouri in reversing the lower court and over-ruling the demurrer, after considering points which need not be here mentioned (on page 310) said:

"In the case of the *Pacific R. R. Co.* vs. *Seely et al.*, 45 Mo. 212, we decided that although a railroad company was in one sense a private corporation, yet its chartered privileges were still granted to subserve great public interests, and that it was the duty of the directors and members of the Company to exercise their best and unbiased judgment upon the question of fitness in locating depots, without being influenced by distinct and extraneous interests having no connection with the accommodation of the public or the interests of the Company. The Company have a deep interest in these transactions, and the directors and members of a corporation will not be permitted to reap a private gain or benefit at the expense of the public convenience, and to the detriment of the community."

"But there is nothing set out in the amended petition on which this case was tried, to show that any sinister, extraneous or corrupting influences were brought to bear upon the Company to superinduce the location. It is not alleged that anything was directly paid to the directors, or that they obtained any private advantage in consequence of their action. If such were the facts, as they do not appear on the face of the petition, the objection should have been taken by answer, and the proof submitted upon the trial. How and in what manner the labor and money were expended to secure the location does not appear. If parties voluntarily combine, in furtherance of a great public enterprise, to assist a Company in the erection of a depot, I can see no objection to it, if it is done honestly and in good faith."

"There is nothing to show that the arrangement was either wrongful or corrupt, and the court, in arriving at that conclusion, indulged in a presumption. I think the presumption is

not warranted. The judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer and permit the defendant to file his answer. Judge Currier concurs; Judge Bliss absent."

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48 Iowa, 211.

Subject: Decision sustaining Contract assailed as against public policy.

In *Denison* vs. *Crawford County*, 48 Iowa, p. 211, the case is stated in the syllabus as follows:

"I. Contract: Swamp Lands: Public Policy. A contract between a county and an agent provided that the latter should be authorized to make the proper application to the general government for its swamp lands or indemnity therefor, and that he was to receive one-half of what he thus procured for his services. To effect the object of his contract, certain congressional action became necessary, which he aided in procuring by legitimate means. Held, that the contract was not void as against public policy, and that a county may lawfully employ agents for such purpose, and that an agreement to pay them is valid."

On pp. 215–216 the Supreme Court of Iowa said: * * *

"Congress had recognized the fact that the defendant was entitled to the swamp lands within its borders, and if the same had been sold, to money in lieu of such. Before this claim, however, could be recognized or made available, certain things had to be done by the county. As it turned out after the contract was made, it became necessary to bring the matter to the attention of Congress and obtain further legislation."

"It was perfectly competent for the county to employ agents or attorneys for this purpose, and an agreement to pay them therefor is valid. Such agents may lawfully draft 'the petition to set forth the claim, attend to the taking of testimony, collecting facts, preparing arguments and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced.' Swayne, J., in *Trist* vs. *Child*, 21 Wall., 441."

"If, however, the agent or attorney conceals from the members of Congress the capacity in which he is acting, or

appears to be other than he actually is, legislation procured thereby may be said to have been obtained by improper means, and a contract to pay a compensation therefor is void as against public policy. *Marshall* vs. *Balt. & Ohio R. R. Co.*, 16 How., 314."

"In these cases, and all others of a like character to which our attention has been called, either the contract on its face, or when viewed in the light of the circumstances surrounding the transaction, clearly disclosed the fact that improper means and influences were to be used to accomplish the desired end. The parties so contemplated, and contracted accordingly. Nothing of the kind appears here, and if this contract be declared void, then it will be difficult, if not impossible, to make one providing for the compensation of an agent or attorney who may be employed to prosecute claims before any department of the Government. Conceding it to be proper to look at what was done by Skinner when at Washington City, endeavoring to obtain the passage of the act of Congress of March 5, 1872, for the purpose of arriving at the design and intent of the contract (which we very much doubt), still we are unable to say anything was done by him that was improper to accomplish that result."

"There is nothing which tends to show he used any means except such as were calculated to appeal to the reason and judgment of the members of Congress."

"Agents of this State and of Missouri, together with persons employed by other counties, were in Washington endeavoring to accomplish the same result. By their combined efforts, and the justice of the measure asked, they were successful. Without any serious doubt we think Mr. Skinner claims fully as much credit, if not much more, than he is fairly entitled to."

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41 Minn., 242.

Subject: Decision sustaining Contract assailed as against public policy.

In *Moyer* vs. *Cantieny*, 41 Minn., 242, the Supreme Court of Minnesota said:

"The plaintiff is an attorney at law. The action is for the recovery of an alleged stipulated compensation for services in procuring the pardon of the defendant's son, who was imprisoned for a term of years in the State penitentiary. The appellant's contention, that the Court should declare the contract to have been illegal, cannot be sustained. The presumption of law is in favor of the legality of contracts, and, the object sought to be accomplished being lawful, unless it affirmatively and distinctly appears that it was contemplated that means were to be resorted to for its accomplishment which the law would not sanction, the courts cannot declare the contract invalid. There was nothing unlawful or opposed to public policy in simply employing the plaintiff to endeavor, by proper means, to secure a pardon. *Chadwick* vs. *Knox*, 31 N. H., 226 (64 Am. Dec., 329); *Formby* vs. *Pryor*, 15 Ga., 258; *Bremsen* vs. *Engler*, 49 N. Y. Super. Ct., 172. The grounds upon which constitutional power to pardon may be exercised are not defined in this Constitution; but among the considerations which might properly be brought to the attention of the Governor, and influence his action, are some which suggest the propriety of employing the professional services of an attorney for this purpose, and from the mere fact of an attorney being employed to solicit the pardon of a convict it is not legally inferred that an unlawful course of conduct was intended. For instance, it would be proper, and often expedient, that an attorney at law examine the case upon which the conviction was based to see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt, not discoverable at the time of the trial. The attention of prosecuting officers and of the judge who tried the cause may be directed to newly-discovered facts, or to any of the circumstances of the case, and their recommendation in favor of a pardon may be sought. Whatever considerations may properly affect the action of the Executive may be urged upon his attention. Even if there was any evidence in this case

which would have justified the conclusion, as a matter of fact, that political influence, or any unlawful means, were expected to be exerted for the accomplishment of the end in view, no case was presented justifying the court in so declaring as a matter of law."

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67 Mich., 130.

Subject: Decision sustaining Contract assailed as against public policy.

In *Beal* vs. *Polhemus*, 67 Mich., 130, the second pragraph of the syllabus is as follows:

"2. An agreement for the payment of a certain sum of money on condition that the payee should erect a building at a specified place, near the payor's property, to be occupied as post-office by a given date, is not void as opposed to public policy, it appearing that the payee used no undue influence in securing the location of said post-office, and was guilty of no corruption or corrupt practice in making such contract."

The plaintiffs sued on the agreement mentioned in the syllabus which was a note for $600.00, a copy whereof may be seen on the face of the opinion. The lower court gave judgment for the plaintiff. In affirming this judgment the Supreme Court of Michigan (pages 132, 133, 134) said:

"It is contended, in an able argument by counsel for the defendant, that the contract is void as opposed to public policy. This argument is based upon the assumption that Beal, who was a prominent member and leader of the then dominant party in the nation, sold his influence with our Senators, and that this contract was given in payment for such influence; that in consideration of the payment of the sum therein mentioned, Beal stipulated to exert his personal and party influence upon an officer of the government. And it is claimed that such personal influence cannot be a matter of bargain and sale to be enforced by the courts."

* * * * * * * *

"But the argument does not touch the present case. Mr. Beal had a perfect right to be heard before any officer of the government, or any department of the same, as to the merits of his building, as a place for the location of the postoffice."

"It is not shown by the findings or the evidence in the case, that he used any improper means to gain this point, or even that he influenced any Senator or Representative in Congress, or any officer of the government, to interfere in his behalf. He went to Washington personally, and, while there, secured the location of the office where he wanted it; but there is not the slightest testimony that he used any undue means to accomplish his end. We cannot presume that he used his personal power, which is said to have been very great, in a corrupt or unseemly manner, or in violation of any public policy. For aught we know, he appeared as any other citizen might and has a right to do, before the proper office at Washington, and stated the merits of his claim so convincingly and conclusively, that the location desired seemed to be the most proper and available one. Certainly there could be nothing wrong in this. It is true, there is evidence in relation to some of the contracts not in suit, that Beal boasted he could control the Senators from this State, and that he must have money to go to Washington to do so; but there is no testimony that either one of them lifted a hand or said a word in his behalf. And there is nothing to show that in the present case he made any such representations to obtain the contract."

"The defendant agreed to pay a certain sum upon the accomplishment of an object in which he saw a future benefit to his property. That object was attained, and he has had the benefit he desired. There is no valid reason why he should not fulfil the contract on his part, as Beal promptly fulfilled his part of the agreement.

"The judgment of the court below is therefore affirmed with costs."

33 L. R. A., 166.

Subject: Decision sustaining Contract assailed as against public policy.

In *Houlton* v. *Nichol*, decided by the Supreme Court of Wisconsin May 22, 1896, and reported in 33 Lawyers' Reports Annotated, page 166, the court decided, as stated in the second paragraph of the syllabus, that

"2. A contract for the presentation before the Secretary of the Interior of the legal status of certain public lands with a view of having them thrown open to settlement under existing laws, not as a favor, but as a right to which all persons similarly situated were entitled, without any attempt to procure legislation, is not against public policy, when it does not appear that any act illegal *per se* or of corrupt tendency was contemplated."

And Marshall, J., speaking for the court, page 168, said:

"As applied to contracts like the one before us, the dangers and mischiefs that may arise from allowing parties to make merchandise of mere personal solicitation and influence, is what the law seeks to guard against, by closing the doors of the courts securely against all efforts to enforce, or to secure the fruits of, agreements that involve such elements as a subject of sale, either expressly or by necessary inference. Does the agreement under consideration come within the condemnation of the salutary rule referred to? That is the question. Unless it does, clearly, the contract should be upheld."

"As very truly said by Sir George Jessel, M. R., in *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq 462: 'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.'"

"This means no more, we take it, than that it should be

made to appear clearly—that is, beyond reasonable controversy—that the contract is void, as contrary to law or sound morals, else it should be sustained. In the light of the foregoing, the contract in question must be subjected to a judicial interpretation in order to dete rmine whether it contains the fatal element or not; for it cannot be seriously contended that by its terms, either as set forth in the complaint or established by the evidence, it necessarily required the doing of anything of an improper character or necessarily tended to any such thing. Plaintiff agreed to furnish defendant with minutes of desirable lands on the public domain upon which to locate, and to instruct him in respect to what he should do as a settler on such lands in order to secure priority under the land laws of the United States, and to do all that was necessary or could be done to bring the land in question into market, and enable defendant to acquire title thereto. Wherein does this language contemplate the doing of anything illegal? The intention of the parties must be gathered from the language they used, from the contract actually made, in the light of attending circumstances, the same as in any other case. If, properly construed, it does not, by its terms or by necessary implication, contain anything illegal, or tend to any violation of sound morals, the fatal element should not, through an over-zealous desire to fortify against the deplorable effects of lobbying contracts, strictly so-called, which all recognize and should unhesitatingly condemn, be injected into it by mere suspicion and conjecture that the parties intended to do some illegal act, or a legal act by illegal means, or that the agreement might have probably led to improper influences upon, or tampering with, official conduct, and thereby defeat the contract."

"It is sometimes lost sight of that the presumptions in human affairs are in favor of innocence rather than of guilt, and that such rule applies in testing such a contract as the one we have here by the principles of sound morals. *McBratney* v. *Chandler*, 22 Kan., 692, 31 Am. Rep., 213."

And at page 70, the same judge speaking for the court, said:

"The evidence showed that the plaintiff attended sessions

of Congress, appeared before its Committees, and employed counsel to urge the passage of a bill forfeiting lands to the Government, and to open them to settlement in such a way as to secure priority of settlers thereto. So far as we can gather from the reported case, all acts done in regard to obtaining legislation, were prior to the making of the agreement. There was really nothing in the language or purposes of the contract viewed in the light of attending circumstances, and what was actually done, showing that improper influence was contemplated, or that there was any tendency to that end. There was no personal soliciting of members of Congress, or the officers of the Interior Department. The carrying out of the contract did not require or lead to any such thing, for it was, so far as it relates to any official action, a mere agreement to promote the enforcement and application of existing laws and established regulations of the Interior Department to existing conditions, to the end that persons having a right to select and acquire lands on the public domain might exercise such right. This required only the collection of facts and presenting them to the proper officers, and making arguments thereon in respect to the legal status of the lands under the circumstances, and the rights of parties under such existing laws and regulations, to acquire such lands. The fact that plaintiff was not a member of the legal profession makes no difference with the legitimate character of his services, in the face of the undisputed fact that such services required special knowledge and training, and that plaintiff, by years of study and experience, had qualified himself to render valuable services to his employers. Under these circumstances, to infer that the services contracted for were other than such as are sanctioned by *Burke* v. *Child*, *supra*, the collecting of facts, making of arguments, and promoting action by appeals to reason,—is rather to reverse the rule which presumes innocence rather than guilt, in the affairs of life.

"So far as *Houlton* v. *Dunn*, *supra*, is inconsistent with the decision in this case, we are not disposed to follow it, but to hold, that unless the contract was for the performance of some act illegal, *per se*, or to do something

of itself of a corrupting tendency, or by its terms, or by necessary implication it contemplated a resort to improper means, such as personal solicitation or influence, something other than an appeal to reason of the department officers whose action was sought, or to obtain their action as a favor instead of as a right, it should be upheld."

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3 Head (Tenn.), 92.

Subject: Decision sustaining Contract assailed as against public policy.

In the case of *Nichols* v. *Cube*, 3 Head (Tenn.), 92.

N. conveyed land to C., in order to constitute him a freeholder that he might go N.'s bail, and to save him harmless as such. There was a verbal agreement that the conveyee was to hold the land as long, only, as was necessary for the purpose. On disclosure of the facts to the court, C. was refused as bail. N. was convicted and sent to the penitentiary, where he died. The widow and heirs of N. sued C. for the land, and he pleaded in defense that the contract between him and N. was contrary to public policy, and there could be no recovery.

The second and third propositions of the syllabus are as follows:

"2. SAME. *If executed for a fraudulent or immoral purpose.* If such deed is made for a fraudulent, criminal or immoral purpose, or, to enable the parties to do any act in violation of law, or contravene any rule of public policy, the courts will not interpose to grant relief, but will leave them, without redress, where their fraudulent conduct has placed them."

"3. SAME. *Same. Evidence must be clear.* To repel a party that has been wronged, from the courts, without redress, the fraudulent, criminal, or immoral purpose must be, clearly, made to appear. Presumptions will not be strained to defeat equity and justice, by closing the doors against the injured."

In the course of its opinion the court, at pp. 94–95, said:

"Nothing was paid, or ever intended to be paid, no risk was run, and no damage sustained, by Clark. It would be iniquitous to allow him to retain the land against the complainants, if the merits of the case can be reached. But the defence is not placed upon the merits, but upon a sound and well-approved legal rule, which, in cases to which it applies, repels parties from

courts of justice, and closes the doors against them, no matter how great their wrongs may have been. This is where the party has been guilty of or contemplated in the particular matter, some fraudulent, criminal or immoral act, some breach of good morals, or where the act was in violation of some rule of public policy. In such cases the courts will not interpose, but leave the parties without redress, whatever claims they may have upon each other.

"In this case the Chancellor based his action in dismissing the bill upon the ground that the object in conveying to Clark was improper, and against public policy. We do not give it that complexion. That the cause of the act done was to make Clark a freeholder, and as such qualified to become bail, is clear. But was there anything wrong in that? If he had been received without the deed, the land would have been bound in the hands of Nichols, and if after the deed, it would be bound in his hands. The land, in either case, would stand as a security for the penalty of any recognizance or bail bond that might be taken. The purpose was to put Clark in condition to be taken by the Court, by making him a freeholder, which they thought to be indispensable, and, perhaps, such was the practice of the Court. What fraud was that intended to perpetrate? It could make no difference whether he paid anything for it or not, the land would have been equally bound to the State. No imposition was or could have been practiced upon any one. It is not unusual or contrary to public policy for a criminal to give bail, or to endeavor to procure bail, by conveying his property to others, to render them responsible for the penalties to be incurred. If Clark had been otherwise good, and this land had been expressly mortgaged in due form, or in any legal mode, for his security, there could have been no objections. What difference can it make where there was the double object of both qualifying and securing him? It is said that the object was to induce Clark to commit perjury before the Court, when offered as bail, by stating that the land was his. This was not at all necessary. It was sufficient that he had title to the land so as to bind it under his recognizance. It was only important to the State that he had such a title as would subject the land in case of forfeiture. Nothing

else was necessary to be stated to accomplish the objects intended. No necessity for false swearing was imposed by the transaction.

"It is also insisted that the whole scheme was to get the criminal out upon bail, that he might make his escape from justice. If that were so, it would be such an unlawful purpose as would stain the hands of all concerned, and exclude them from the courts. But there is no evidence that such was the intention. From all that we can see, nothing more was designed than to be admitted to bail in the ordinary way, and for the common reasons. We are not to strain presumptions to defeat equity and justice, by closing the doors against the injured. It ought to be a clear case of turpitude, or violation of public policy, to repel a party that has been wronged from the courts of justice. The effect of applying the rule of repulsion in this case would be to shield the defendants in a case of most glaring iniquity."

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10 La. Ann., 199.

Subject: Decision sustaining Contract assailed as against public policy.

Hertz vs. *Wilder*, 10 Louisiana Annual, 199—suit upon five promissory notes by attachment—defense, want of consideration: in support of which documentary and oral evidence was introduced tending to prove a corrupt and immoral contract connected with the giving of the notes which were said to be without other consideration.

The syllabus of this case, page 199, is as follows:

"Although a party may sometimes be permitted to allege and prove that the form of a legal contract has been used to cover a corrupt or flagitious transaction, yet such an allegation puts the party who makes it in a position so questionable, that the Judge is not only authorized, but obliged, to sift with the greatest care the evidence adduced in its support, and only to give his credence when the evidence is so complete that it

forces itself upon the conviction with the power of demonstration."

Group of English Cases, prominently cited in text books, touching question of public policy.

For English authorities bearing favorably upon the complainant's case upon the *general question* of public policy, see:

Edwards vs. *Grand Junction Ry Co.*, 13 Eng. Ch., 1 My. & Cr., 649.

Stanley vs. *Chester & Birkenhead Ry Co.*, 14 Eng. Ch., 773.

Simpson vs. *Lord Howden*, 37 E. C. L., 249: on Appeal to House of Lords, 9 Clark & Fin., 61.

In the last mentioned case, Lord Howden, a peer of Parliament, sued upon a covenant contained in a deed by which, in consideration of his withdrawing opposition to a bill for a projected railroad passing through his estates, the defendants promised, if possible, to deviate that road and to pay him a large amount of damages. Both the lower court and the House of Lords sustained the right of the plaintiff to recover. The opinion of the lower court is especially strong and vigorous, and the following is an extract therefrom:

"* * * The ground upon which the deed in question was contended to be a fraud on the Legislature is this: that the plaintiff and defendants were to be considered as having agreed together to represent to the Legislature the line of road described in the then pending bill as the line which was to be adopted and acted upon, whilst, in truth, they intended at the time to apply for, and adopt, and act on, another, if obtained. This is the view which Lord Langdale inclined to think might ultimately be taken of this transaction. *Simpson* vs. *Lord Howden*, 1 Keen, 583. It was also argued that Lord Howden and the proprietors must be considered as having agreed to represent the proposed line of the road as the best for the public interests, though in reality they never meant to carry it into effect, and had a better

in prospect. In either view of the case, the supposed fraud consists in an intention to make a false representation to the Legislature, by stating the object of the adventurers to be to carry one line into effect and concealing the design of applying for another. In both it is essential in order to make the deed a fraud upon the Legislature, that the contract to apply for a new act should be intended by both parties to be kept secret from it. For, if it was to be disclosed, the idea of an intended fraud upon the Legislature is obviously out of the question. It is not enough that the existence of such an agreement was, at the time of entering into it, and afterwards, in fact, kept secret from the Legislature and all the world besides by both parties. The quality of the agreement, whether fraudulent or not, must depend upon the intention of the parties to it at the time of making it; and, if there did not then exist the intention of deceiving the Legislature by concealing from it, whilst the petitioners were asking for one set of powers, the purpose of asking afterwards for others, the agreement cannot be void, whatever imputation might rest on the conduct of the parties in making the subsequent concealment." * * * *

See also the following American cases:

Spaulding v. *Mason*, 161 U. S., 376–397.
Wylie v. *Coxe*, 15 How., 415.
Wright v. *Tibbetts*, 91 U. S., 252.
Staunton v. *Embrey*, 93 U. S., 548.
Taylor v. *Burriss*, 110 U. S., 42.
Sedgwick v. *Staunton*, 44 N. Y., 289, 293–4.
Southard v. *Boyd*, 51 N. Y., 177–179.
Legon v. *Mitchell*, 36 N. Y., 235.
Bridgford v. *City of Tuscumbia*, 16 Fed. Rep., 910.

WITHDRAWAL OF COMPETITION

As above stated, the only class of contracts contravening public policy to which, in the several arguments below, any earnest effort was made to assimilate the case at bar, was—contracts held void as providing for the ***withdrawal of competition*** in which the public is interested and by which it is likely to be benefited. We have already denied the applicability of the rule, and denied that, in our case, there was any withdrawal or loss of competition likely to prove of advantage to the public; and we have submitted that ***concealment*** is a necessary element in invalidating contracts upon this ground. We now assert and will endeavor to show that the authorities upon this branch of the case embody limitations, qualifications and exceptions which clearly exclude the case at bar.

Some of the leading cases are as follows:

Wicker v. *Hoppock*, 6 Wall., 94.
Kearney v. *Taylor*, 15 How., 495.
Phippen v. *Stickney*, 3 Mete., 384.
Marsh v. *Russell*, 66 N. Y., 288.
Bellows v. *Russell*, 20 N. H., 427.
Oakes v. *Cal. Water Co.*, 143 N. Y., 431.
Jenkins v. *Frink*, 30 Cal., 586.

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6 Wall 94.

Subject: Withdrawal of Competition.

In the case of *Wicker* v. *Hoppock*, 6 Wall 94, the first paragraph of the syllabus is as follows:

"1. The rules about judicial sales which make void as against public policy agreements that persons competent to bid at them will not bid, forbid such agreements alone as are meant to prevent competition and induce a sacrifice of the property sold. An agreement to bid, the object of it being fair, is not void."

On pp. 97-98 Mr. Justice Swayne, delivering the opinion of the Court, said:

"It is said that the agreement between the parties 'was invalid because calculated to interfere with, and prevent the fairness and freedom of a judicial sale; and prevent competition, and therefore against public policy.'

"The contract was, that the defendant in error should procure judgments against Chapin & Co. for the rent in arrear, levy upon the machinery and fixtures in the distillery, and expose them for sale, and that the plaintiff in error should bid for them the amount of the judgments.

"The validity of such an arrangement depends upon the intention by which the parties are animated, and the object sought to be accomplished. If the object be fair—if there is no indirection—no purpose to prevent the competition of bidders, and such is not the necessary effect of the arrangement in a way contrary to public policy, the agreement is unobjectionable and will be sustained.

"In one of the cases to which our attention has been called there was an agreement between two persons, that one of them only should bid, and that after buying the property he should sell a part of it to the other upon such terms as the witnesses to the agreement should decide to be just and reasonable.

"In another it was agreed that a party should bid a certain amount for a steamboat about to be sold under a chattel mortgage, and transfer to the mortgagor an undivided interest of one-third, upon his paying a corresponding amount of the purchase-money.

"In a third case the agreement was between a senior and junior mortgagee. The former agreed to bid the amount of his debt for a specific part of the mortgaged premises.

"In each of these cases the arrangement was sustained upon full consideration by the highest judicial authority of the State.

"In the case before us, the agreement was, that Wicker should bid. There was no stipulation that Hoppock should

not. There was nothing which forbade Hoppock to bid, if he thought proper to do so, and nothing which had any tendency to prevent bidding by others. The object of the contract, obviously was to be secure,—not to prevent bidding. The benefit and importance of the arrangement to the interests of the judgment debtors is made strikingly apparent when the subject is viewed in the light of the consequences which followed the breach of the agreement. Instead of the property selling for the amounts of the judgments, Hoppock was the only bidder, and the property sold was struck off to him for a nominal sum.

"There was no error in the ruling of the court upon this subject."

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15 How., 495.

Subject: Withdrawal of Competition.

In the case of *Kearney* vs. *Taylor*, 15 How., 495, the United States Supreme Court (pages 519–521) said:

"There are some cases deriving their principles from the severe doctrines of *Bexwell* vs. *Christie*, Cowp., 396, and *Howard* vs. *Castle*, 6 T. R., 642, to be found in books of high authority in this country that would carry us the length of avoiding this sale, simply on the ground of this association having been formed for the purpose of bidding off the premises, for the reason that all such associations tend to prevent competition, and thereby to a sacrifice of the property. (3 Johns, Cas., 29; 6 Johns., 194; 8 Id., 444; 13 Id., 112; 2 Ham., 505; 5 Halst., 87; 2 Kent, 539; 1 Story's Eq. Jur., sec. 293). Later cases, however, have qualified this doctrine, by taking a more practical view of the subject and principles involved, and have placed it upon ground more advantageous to all persons interested in the property, while at the same time affording all proper protection against combinations to prevent competition. (2 Dev., 126; 3 Mete., 384; 25 Maine, 140; 2 Const., S. C., 821; 3 Ves., 625; 12 Id., 477; 11 Serg. & Rawle, 86)."

"It is true that in every association formed to bid at the

sale, and who appoint one of their number to bid in behalf of the company, there is an agreement, express or implied, that no other member will participate in the bidding; and hence, in one sense, it may be said to have the effect to prevent competition. But it by no means necessarily follows that if the association had not been formed, and each member left to bid on his own account, that the competition at the sale would be as strong and efficient as it would by reason of the joint bid for the benefit and upon the responsibility of all. The property at stake might be beyond the means of the individual, or might absorb more of them than he would desire to invest the article, or be of a description that a mere capitalist, without practical men as associates, would not wish to encumber himself with. Much of the property of the country is in the hands of incorporated or joint stock companies; the business in which they are engaged being of a magnitude requiring an outlay of capital that can be met only by associated wealth. Railroads, canals, ship channels, manufacturing establishments, the erection of towns and improvement of harbors, are but a few of the instances of private enterprise illustrating the truth of our remark. It is apparent that if, for any cause, any one of these, or of similar masses of property, should be brought to the stake, competition at the sales could be maintained only by bidders, representing similar companies, or associations of individuals of competent means. Property of this description cannot be divided, or separated into fragments and parcels, so as to bring the sale within the means of individual bidders.

"The value consists in its entirety, and in the use of it for the purposes of its original erection; and the capital necessary for its successful enjoyment must be equal not only to purchase the structures, establishments or works, but sufficient to employ them for the uses and purposes for which they were originally designed."

"These observations are sufficient to show that the doctrine which would prohibit associations of individuals to bid at the legal public sales of property, as preventing competition, however specious in theory, is too narrow and limited for the practical business of life, and would oftentimes lead inevitably

to the evil consequences it was intended to avoid. Instead of encouraging competition, it would destroy it. And sales, in many instances, could be effected only after a sacrifice of the value, until reduced within the reach of the means of the individual bidders."

"We must therefore look beyond the mere fact of an association of persons formed for the purpose of bidding at this sale, as it may be, not only unobjectionable, but oftentimes meritorious, if not necessary, and examine into the object and purposes of it: and if, upon such examination, it is found that the object and purpose are, not to prevent competition, but to enable, or as an inducement to the persons composing it, to participate in the biddings, the sale should be upheld—otherwise if for the purpose of shutting out competition, and depressing the sale, so as to obtain the property at a sacrifice."

"Each case must depend upon its own circumstances; the courts are quite competent to inquire into them, and to ascertain and determine the true character of each."

3 Metcalf, 384.

Subject: Withdrawal of Competition.

In *Phippen* vs. *Stickney*, 3 Metcalf, 384, an action was brought to recover $100 for breach of an agreement in the following words:

"Know all men by these presents, That I, Richard Stickney, in consideration that Hardy Phippen will permit me to purchase a certain piece of land, to be sold this day, bounded on said Phippen and myself, do hereby agree to purchase the said lot of land, and by this instrument do hereby agree to sell and convey to said Phippen the said piece of land on such terms as we, the said Phippen and Stickney, shall hereafter agree upon, or on such terms as the witnesses to this instrument shall decide to be just and reasonable: Said conveyance to Phippen to be made by said Stickney as soon after the sale to be made this day, as can reasonably and conveniently be made; it being understood and agreed that the said Stickney will reserve the court or passage way, and the trees on the lot said Stickney agrees to convey to Phippen and his heirs, to himself; said trees to remain on the land until the fall, or a suitable time to remove them. In default of any part of the con-

dition of this agreement, we bind ourselves, and our heirs respectively, in the sum of one hundred dollars, to be duly paid to the injured party. Salem, May 23, 1838. In witness whereof we this day fix our hands and seals." (Signed and sealed by both parties, and attested by three subscribing witnesses.)

On pages 388–389, the Court said:

"It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void as a fraud upon the rights of the vendor and as against public policy, merely because he who seeks to enforce the contract may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence in sales of large magnitude, where two or more persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding. By such an association as is just supposed, the interest of the vendor, as well as that of the vendees, would be directly advanced."

"The extent, to which the doctrine of invalidating such contracts can be safely carried, would rather seem to embrace within the rule all cases of fraudulent acts, and all combinations having for their object to stifle fair competition at the biddings, with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this, the application of the principle contended for may be found productive of mischief and an unwarrantable interference with the course of business in auction sales. We are therefore of opinion, that an agreement between A. and B., that A. will permit B. to become the purchaser of certain property about to be offered at sale at public auction, and that A. shall participate with B. in the benefits of the purchase, will or will not be fraudulent, as the circumstances of the case show innocence

of intention or a fraudulent purpose in making such agreement; that where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article offered for sale, below the fair market value, it will be illegal, and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding."

"In the case before us, upon the facts stated, we do not feel authorized to set aside this agreement as illegal or fraudulent upon the principles we have stated. Fraud is not to be presumed, where the contract is, on the face of it, consistent with honesty of purpose and fair dealing. If the defendant would avail himself of a defense of that character, it must be upon the finding of a jury, or upon a case stated by the parties clearly disclosing such fraudulent purpose. This contract might have been entered into by these parties, for good and justifiable reasons; and it is not, therefore, to be deemed fraudulent and void upon face of it."

66 New York, 288.

Subject: Withdrawal of competition.

In *Marsh* vs. *Russell*, 66 N. Y., 288, the action was for an accounting as between co-partners. "The complaint set forth the following contract:

"It is hereby understood and agreed, by and between the undersigned, that if the undersigned, or either of them, shall make a contract with one or more towns in Washington County, N. Y., to fill the quota of such town or towns, under an anticipated call of the government for volunteers, for a sum not less than five hundred dollars per man, *that all gains* or profits which may accrue in *such business* shall be divided equally, share and share alike, between the under-

signed, and that all losses shall be paid equally by them. It is further understood and agreed that the undersigned, or either of them, shall make no agreement to furnish the quota of any town for a less sum than five hundred dollars per man, without the consent of all the undersigned. That if two or more towns shall be contracted with to furnish their respective quotas for five hundred dollars per man, or more, by the undersigned, then, and in that case, it is hereby understood and agreed that the undersigned shall furnish eighteen men, or whatever the quota of the town of Hebron may be, at the rate of four hundred dollars per man."

"June 18, 1864.

(Signed) WM. A. RUSSELL,
(Signed) H. R. COWAN,
(Signed) A. M. BATES,
(Signed) P. J. MARSH."

(Copy.)

The following are extracts from the opinion of the court, pages 291–294:

"Earl, J. The complaint was dismissed upon the ground that the contract set out therein was upon its face against public policy, and therefore void: the claim on the part of the defendants being that the necessary and direct effect of the contract was to prevent competition between parties thereto in furnishing recruits."

"The contract made the parties thereto partners in furnishing recruits for the towns of Washington County. They were to be jointly interested in the business and to share equally in the profits and losses thereof. As regulations of their business, they provided that the individual contracts of the members of the firm should inure to the benefit of the firm and that no contracts to furnish recruits should be made for a less sum than $500 for each recruit. It does not appear that the parties had control of any recruits, much less that they had a monopoly of them, or that the towns were in any way obliged to get their recruits from them, or that the price charged was an unreasonable or unusual price, or that the parties did or could, by their contract, put up the price of recruits or embarrass the town in filling their quotas, or that the agreement was kept a secret. It is not a necessary inference from the terms of the contract that the purpose of the parties was an improper

or unlawful one, or that its effect would be to thwart the policy of any law or to injure or jeopardize any public interest."

"The business of furnishing recruits was a lawful one, and could be carried on by individuals or firms; when carried on by a firm its members could regulate the price at which they would buy and sell, as they could if they had been dealers in other articles having a price. Suppose they had formed a partnership to buy and sell wheat, how can it be doubted that they could lawfully agree in their articles of co-partnership that neither member of the firm should come in competition with the firm, and that wheat should not be purchased for more than a certain price nor sold for less than a certain other price? Such an agreement would, certainly, not upon its face, be unlawful, and could only be condemned by proof that it was part of a conspiracy to control prices or create a monopoly, or that it was made for some other unlawful purpose."

"Our attention has been called to no case in conflict with these views. In *Gulick* v. *Ward* (5 Halst., 87), *Gardiner* v. *Morse* (25 Maine, 140), *Doolin* v. *Ward* (6 Johns., 194) and other cases cited, there were agreements to prevent competition at auction sales made by public officers or in pursuance of law of property which was required to be sold to the highest bidders, and hence the agreements were held to be against public policy and void. At such sales firms may bid as well as individuals, and if the firms are formed for the honest purpose of carrying on a joint business, it matters not that the incidental effect may be to diminish the number of bidders. If, however, the primary object of the firm is to prevent competition then it might be considered as against public policy. In *Atcheson* v. *Mallin* (43 N. Y., 147) the general rule was laid down that when a contract for the performance of any public service or work is to be awarded to the bidder therefor offering terms most favorable to the public, any agreements between parties, designing to make bids, tending either directly or indirectly to restrain or lessen rivalry and competition between them, is void as against public policy; even although it may not appear that such agreement did really produce any result detrimental to the public

interest. In that case, however, Folger, J., stated that: 'A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not forbidden by public policy.'

* * * * * * *

"The true rule is laid down in *Phippen* v. *Stickney* (3 Met., 384) where it was held that an agreement between A and B that A will permit B to become the purchaser of certain property about to be offered for sale at public auction, and that A shall participate with B in the benefits of the purchase, was not upon its face fraudulent, but would or would not be so, as the circumstances of the case showed innocence of intention or a fraudulent purpose in making such agreement. * * *

"So here, if it could be shown that this agreement was made by the parties for the purpose of perpetrating frauds upon the towns of Washington County and compelling them, by preventing competition, to pay an enhanced price for recruits, and not for the honest purpose of carrying on a legitimate enterprise in an honest way, it would be brought within the cases cited by the learned counsel for the defendants and would be considered as against public policy."

20 N. H., 427.

Subject: Withdrawal of Competition.

In *Bellows* vs. *Russell*, 20 New Hampshire, 427, suit was instituted upon a contract in the following words:

"It is agreed that the subscribers shall, on their joint account, endeavor to procure the mail contract on route No. 169, from Haverhill to Lancaster, N. H., from July 1, 1837, to June 30, 1841; and in case they succeed it shall be divided at Littleton, the north half to belong to the subscriber, George Bellows, and the south half to the subscribers, the Littleton Stage Company; and in case of disagreement between the parties in relation to the division and apportionment of the mail money, it shall be submitted to the decision of some competent person. In case the contract shall be obtained by either of the parties, or by a third person for the benefit of either party, it shall be in trust for the purpose aforesaid.

(Signed) GEORGE BELLOWS,
(Signed) LITTLETON STAGE CO.,
(Signed) By L. A. RUSSELL, Agent.

May 2, 1837."

The only question submitted was as to the legality of the contract. As to this, the plaintiff admits that at the time when it was made the parties met at Littleton, in this State, and learning that each intended to bid for the mail route named, and had made some preparations for that purpose, entered into the contract, reduced the same to writing, and signed it.

On page 429, Gilchrist, J., delivering the unanimous opinion of the Superior Court of Judicature of New Hampshire, said:

"It is, therefore, a well-settled doctrine, and is undoubtedly a reasonable one, that holds to be illegal and fraudulent a combination of parties for the express purpose of preventing competition among bidders at an auction, with a view to take advantage of such a state of things for their own benefit.

"It is, however, a different thing entirely to hold that where several parties desire, for any reasonable and just purpose, to become the joint purchasers of property exposed at auction, or to become interested together in the contract so exposed for the competition of bidders, they may not lawfully employ one of their number to act in behalf of the whole, and to bid off for their benefit the property, job or contract so offered.

"Accordingly, it has been held in Massachusetts, *Phippen* v. *Stickney*, 3 Met., 384, upon a thorough examination of the cases, that the question as to the legality of such associations depended upon the circumstances in which they are formed. Mr. Justice *Dewey*, in delivering the opinion of the court, observes: 'It seems to us, after some consideration of this question, and an examination of the adjudged cases bearing upon it, that we cannot judicially declare that every contract between two or more individuals in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void, as a fraud upon the rights of the vendor, and as against public policy, merely because he who seeks to enforce the contract, may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence, in sales of large magnitude, where persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding.'

"The conclusion of the Court in that case was that fraud could not be

presumed, and that the party who would avail himself of such a defense must first establish the fact by a verdict of the jury."

"We are of the opinion that such is the only just and tenable doctrine on the subject. The intent, and other circumstances attending the consent of the parties to the arrangement disclosed in this case, must settle its legal character.

"The act of Congress relating to the subject, and to which our attention has been directed, seems to contain nothing relating to the question between these parties more than is comprised in the general principles of the common law. It prohibits the Post-master-general from granting contracts to such as shall have entered into 'any combination to prevent the making of any bid,' or who shall have given or promised to give any consideration to induce others not to bid.

"The fair construction of this statute seems not to require us to consider as such a combination an agreement in good faith between several, that one should bid for the whole.

"The case must, therefore, stand for trial upon the question of the alleged fraud."

143 New York, 431.

Subject: Withdrawal of Competition.

In the case of *Frank S. Oakes, Appellant*, v. *The Cattaraugus Water Company*, decided by the Court of Appeals of New York, November 2d, 1894, 143 New York Rep., 43, the plaintiff sued upon an agreement in the following words and figures:

"Cattaraugus, N. Y., Feb 18, 1890.

"This agreement, made by and between the Cattaraugus Water Company, of Cattaraugus, N. Y., and F. S. Oakes, of the same place, Witnesseth: The Cattaraugus Water Company hereby agrees to and with F. S. Oakes to pay him the sum of One Thousand Dollars in consideration of his services to said Water Company in securing right of way, hydrant rental and placing investments, and in all things pertaining to the building of water works at Cattaraugus, N. Y.

"Said sum to be paid at the completion of said works

"Said services to consist of aiding and helping the said Company in the above matters, but without cash expense to said Oakes.

"If said water works are not constructed in Cattaraugus by said Company, then this agreement to be null and of no effect

"This agreement shall be binding on the successors and assigns of the said Company.

(Signed) "GEORGE N. COWAN,
"Att'y for Cattaraugus Water Co.

(Signed) "F. S. OAKES."

The trial court non-suited the plaintiff and the general term of the Supreme Court in the Fifth Judicial department denied the motion by the plaintiff for a new trial and ordered judgment in favor of the defendant. The plaintiff appealed and the Appellate Court reversed the decision of the lower court and granted a new trial.

O'Brien, Judge, in delivering the opinion of the court, pp. 437–9, said:

"But it is insisted that the contract, even if regarded as the corporate obligation, is void as against public policy. There was proof given at the trial tending to show that the plaintiff, before entering into the contract with Cowan, contemplated an application in his own name to the two authorities for permission to form a corporation to construct the works, and that the purpose of the agreement was to compensate him for consenting to abandon the enterprise and allow the defendant to obtain the consent and reap the benefit of the enterprise. It is alleged in the complaint that at the time of entering into the agreement it was understood and agreed between the parties that, in addition to the consideration mentioned in the writing for the payment of the one thousand dollars, the plaintiff was not to prosecute or carry on the business for which the defendant was subsequently organized, and was not to organize any corporation for that purpose, or to ask or receive a franchise from the town authorities for that purpose. It was further alleged that the plaintiff kept and performed these conditions, which were not expressed in the writing, but fully understood between the parties, but did assist Cowan in his efforts to accomplish the purpose originally contemplated by the plaintiff. These allegations are, however, put in issue by the answer. The

proof would have justified a finding by the jury that the plaintiff's promise to abandon the enterprise and leave the field open to Cowan and his associate, was an element that entered into the contract, and an inducement to its execution. No such purpose, however, appears upon the face of the contract. The consideration there expressed for the payment of the money was services which the plaintiff could lawfully perform, and which it is claimed he did perform for the defendant. The court was not warranted in holding, as matter of law, that the purpose of the contract was forbidden by public policy, or that it was made for a purpose other than that stated upon its face. If that question was in the case at all, it was one for the jury, as the evidence was not conclusive, but open to different inferences. But we think that this agreement, upon any view of the facts, does not come within that class of contracts which are forbidden or are held void on grounds of morality or public policy. There was no purpose to suppress competition or bidding at any public sale, or letting of a contract for public purposes or in restraint of trade, or to influence the action of public officials. Assuming that both the plaintiff and Cowan intended to apply for the franchise, and the latter persuaded the former to abandon his purpose and aid him in the manner mentioned in the contract for the consideration promised, there was nothing immoral or that threatened the public interests or the public good in such an arrangement. If the business of a private individual or corporation is threatened with competition, it is not illegal or immoral if one can persuade his competitor to abandon an enterprise in which both cannot succeed, and take employment with the one remaining in the business at a stated compensation. Such an agreement fairly entered into is legitimate business. If the parties in this case deemed it for the interest of both that only one application should be made for a franchise that could be granted to but one of them, the arrangement does not, as I conceive, violate any settled rule or principle of public policy. (*Diamond Match Co.* v. *Roeber*, 106 N. Y., 473; *Leslie* v. *Lorillard*, 110 *Id.*, 519; *Tode* v. *Gross*,

127 *Id.*, 480; *Watertown Thermometer Co.* v. *Pool*, 51 Hun., 157; *Cameron* v. *N. Y. & Mt. Vernon Water Co.*, 62 *Id.*, 269.

"For these reasons the judgment should be reversed and a new trial granted, costs to abide the event."

30 Cal., 586.

Subject: Withdrawal of Competition.

In *Jenkins* v. *Fink*, 30 Cal., 586, the first and second paragraphs of the syllabus are as follows:

"Combination to buy property at Sheriff's sale:—An agreement in writing among several parties, by which one is to purchase land, about to be offered at Sheriff's sale, for the benefit of all the parties to the contract, each furnishing his proportion of the money to the buyer, is not, *prima facie*, fraudulent, nor opposed to public policy."

"When a combination to buy property at Sheriff's sale fraudulent.—"A contract in writing between several persons for one to buy land about to be offered at Sheriff's sale, for the benefit of all the parties, is void as against public policy, and fraudulent, if made to prevent fair competition in bidding, or for any other fraudulent purpose. But if made for mutual convenience of the parties, to enable each to become the owner of a part of the property, or for any other reasonable or honest purpose, the contract will be valid and binding."

General View of the Case at bar as related to the Law of Public Policy.

Indeed, when this case is viewed, as it must be upon demurrer, when all of its features and surroundings are considered, especially that the general project had already been approved by the Legislative body, and the plaintiff and his associates approved as proper persons to receive the grant of the franchise for the same; when, in the ordinance submitted un-

der the contract, and finally passed, the Council reserved absolute choice and control as to the motive power and the character of the road, when, not only was there an utter absence of concealment, but on the contrary a frank and full disclosure of the contract and of the entire case to the Legislature, when indeed every feature reprobated and condemned by the Courts, is absent from the transaction, and every mark of good faith, fair dealing, and proper care and caution, is present, we think we are entitled to say that, to class this case with those in which competition has been improperly withdrawn or stifled, to the detriment of the public; or even to class it anywhere with contracts reprobated and held void as violative of sound public policy is to be guided by forced analogy and strained inference, to an unwarranted and shocking conclusion.

The *second* of the two questions which the law of Public Policy propounds, when applied to the facts of the case at bar, is the following, to-wit:

WHETHER, AFTER A CONTRACT CONTRARY TO PUBLIC POLICY HAS BEEN CONSUMMATED, AND THE FRANCHISE (OR OTHER BENEFIT) CONTEMPLATED IN SUCH CONTRACT HAS BEEN SECURED, AND ONE PARTY HAS APPROPRIATED ALL THE BENEFIT, AND THE OTHER SEEKS JUSTICE AT THE HANDS OF THE COURT AND A FAIR DIVISION; WHETHER, WE SAY—UNDER SUCH CIRCUMSTANCES—A COURT OF EQUITY AND OF CONSCIENCE WILL ENTERTAIN AND APPROVE THE PLEA OF THE WRONGDOER, THAT THE ORIGINAL CONTRACT WAS IMMORAL AND INVALID?

Brooks v. *Martin*, 2 Wall., 70, 80, 81.
Antoine v. *Smith, et als.*, 40 La. Ann., 560.
M. & L. Ry. v. *Concord R. R. Co.*, 66 N. H., 100.
McMullen v. *Hoffman*, 75 Fed. R., 547.
Wilson v. *Owen*, 30 Mich., 474.
Gilliam v. *Brown*, 43 Miss., 641.
Martin v. *Richardson*, 42 Am. St. R., 353.

The following is an extract from the opinion of the court

delivered by Mr. Justice Miller, in the leading case, in 2 Wal., 70, 80–81:

That great Judge said:

"In *Sharp* v. *Taylor*, a case in the English Chancery, the plaintiff and defendant were partners in a vessel, which, being American built, could not be registered in Great Britain, according to the navigation laws of that kingdom. Nor could the owners, who were British subjects, residing in England, have her registered in the United States. They undertook to violate the laws of both countries by having her falsely registered in Charleston, South Carolina, as owned by a citizen and resident of that place. In this condition, she made several trips, which were profitable; and the defendant, colluding with Robertson, the American agent in whose name the vessel had been registered, refused to account with the plaintiff for his share of the profits, or to acknowledge his interest in the ship. When plaintiff brought his suit in Chancery in England, the defendant set up the illegality of the traffic, and the violation of the navigation laws of both governments, as precluding the court from granting any relief, on the same principle that is contended for by the defendant in the present case. It will be at once perceived that the principle is the same in both cases, and that the analogy in the facts is so close that any rule on the subject which should govern the one ought also to control the other. The case was decided by Lord Chancellor Cottenham, and from his opinion we make the following extracts: 'The answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provisions of the act of Parliament. He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor' (the defendant) 'received the money; and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defence by one against the

otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision or some act of Parliament has been violated or neglected? * * * The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties. * * * The difference between enforcing illegal contracts and asserting title to money which has arisen from them, is distinctly taken in *Tennant* v. *Elliott* and *Farmer* v. *Russell*, and recognized, and approved by Sir William Grant, in *Thomson* v. *Thomson*.'

"These cases are all reviewed in the opinion of this court in the case of *McBlair* v. *Gibbes*, and the language here quoted from the principal case is there referred to with approbation. We are quite satisfied that the doctrine thus announced is sound, and that it is directly applicable to the case before us."

40 La. Ann., 560.

Subject: Rule after contract consummated.

The Supreme Court of Louisana, in the year 1888, gave its unqualified approval to the doctrine announced in *Brooks* v. *Martin*. In the case of *Antoine* v. *Smith et als.*, 40 Louisiana Annual Reports, p. 560, the first two paragraphs of the syllabus are as follows:

"Where the cause of the contract sought to be enforced, is unlawful and opposed to good morals and public policy, there is no right of action in the courts, for either party *suing through it*, to enforce it."

"But, after the reprobated transaction has become an accomplished fact, neither party can legally interpose such illegality or turpitude as a defence."

And on pages 567–68, Watkins, J., delivering the unanimous opinion of the court, said:

"But, however much we may reprobate such scandalous

transactions; however much we may feel constrained, for decency's sake, to summarily eject the plaintiff from the portals of the temple of justice, it is our deliberate opinion that it cannot be done in the present attitude of this affair.

"Fortunately, the *regime* in which such abuses were possible, has long since terminated and passed into history, and the people who were instrumental in bringing it about have passed from the stage of action. George L. Smith is dead, and the plaintiff has ceased to be Lieutenant-Governor; D. D. Smith is no longer the representative of George L. Smith, but he is representing his heirs. There stands on the books of the Lottery Company 200 shares of its capital stock, to which *one* of the parties is entitled, irrespective of the fraud and peculation that may have characterized the transactions, through which its issuance and transfer were procured.

"We understand this to be the jurisprudence established on that subject by the Supreme Court. In *Brooks* v. *Martin*, 2 Wallace, 80, that great Court employs this striking language, viz:

"'There was then, in the hands of the defendant, lands, money, notes and mortgages, the results of the partnership business, the original capital for which plaintiff had advanced.

"'It is to have an account of these funds and a division of these proceeds that this bill is filed. Does it lie in the mouth of the partner who has, by fraudulent means, obtained possession and control of all these funds, to refuse to do equity to his other partners, because of the wrong *originally* done or intended, to the soldier? * * * *"*

"'The title to the land is not rendered void by the statute. It interposes no obstacle to the collection of the notes and mortgages. The transactions which were illegal have become *accomplished facts* and cannot be affected by any action of the Court in this case.'

"This opinion was most carefully and deliberately expressed after a thorough review of the best American and English cases on the subject, and the doctrine meets our unqualified approval * * * *."

66 New Hamp. 100.

Subject: Rule after contract consummated.

In *Manchester and Lawrence R. R.* v. *Concord R. R.*, 66 New Hampshire, 100, the Court at p. 132, said:

"There is, however, another ground of relief which should be briefly mentioned. The contracts have been executed on the part of the plaintiffs: they were not immoral, and they were illegal only so far as they were prohibited by statute. Taking this to be so, and regarding the parties as truly *in pari delicto*, the case still falls within the general rule, that 'if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant relief in the case.' Mor. Corp., S., 721. He adds—'These doctrines have been applied repeatedly in suits arising out of contracts entered into by corporations, although prohibited by statute or by the common law; and although the contracts were held illegal and unenforceable in these cases, a recovery was allowed to the extent of the consideration received'—citing: * * *"

Then follows a discussion of *Brooks* v. *Martin*, in the course of which the court, on page 133, said: "It requires no words to apply the doctrine of *Brooks* v. *Martin*, 2 Wall., 70, to the present case: it applies itself. Nor do we find that its application involves any immorality, or that it is forbidden by any other reasons of public policy. Doubtless a court of equity is not positively bound to interfere in cases of this description, and may exercise its discretion: but it is peculiarly the office of equity to do justice, and justice manifestly requires that the defendants should not keep any part of the plaintiffs' equitable

share of the property they obtained from operating the plaintiffs' road, whether legally or illegally. Whatever the Legislature may have intended to accomplish by the anti-monopoly act of 1867, there is no reason to suppose their intention was to reward the Concord Railway for its violation. And however it may once have been, it is certainly now difficult to see how public policy is subserved by allowing the addition of a private wrong to a public wrong, which necessarily results when, without any equivalent in return, one party to an executed illegal transaction excludes the other from participating in the proceeds; and we entirely fail to appreciate the morality which denies in such cases any rights to the party whose money or other property has been thus appropriated by his associate, contrary to express agreement and every principle of fair dealing, and which in conscience the benefited party cannot retain. * * * * * ".

75 Fed. R., 547.

Subject: Rule after Contract Consummated.

In *McMullen* v. *Hoffman*, 75 Fed. R., 547, decided by the Circuit Court of the United States for the District of Oregon, the syllabus is as follows:

"1. CONTRACT OBTAINED BY IMMORAL MEANS. ACCOUNTING BETWEEN CONTRACTORS.

"The fact that parties have, by immoral means, obtained an award of a joint contract with a city for the construction of a public improvement, will not prevent one of them from maintaining a suit against the other for his share of the profits made by performance of the contract. 69 Fed., 509. Reversed.

"2. CONTRACTS FOR PUBLIC IMPROVEMENTS. BIDS BY CONTRACTORS.

"One bidding for a contract to be let by a city is under no obligation to give the city the benefit of knowledge acquired at his own expense by obtaining the estimates of competent engineers as to the cost of constructing the proposed work, even if the means of such knowledge is not within the city's reach.

"3. SAME. ATTEMPTED FRAUD.

"The contractors, by previous agreement, made a bid for their joint benefit, in the name of one of them and a third person, for the construction of certain city improvements, and the contract was awarded to them. One of them, with the other's knowledge and consent, had made a separate bid at a much higher figure, which was not seriously intended. The City Engineer's estimate was higher than the latter bid, and there were three other bids still higher. *Held*, that even if the second bid was put in for a fraudulent purpose, there was, under the circumstances, no room for the inference that it had any influence in the making of the award; and, as the attempted fraud was therefore unsuccessful, it could furnish no ground for refusing to compel one of the contractors to account to the others for his share of the profits made under the contract.

"4. SAME.—ACCOUNTING.—CONTRACTOR'S SALARY.

Where two contractors, by a joint bid, secured a contract to construct a pipe line for the water supply of a city, and one of them failed to furnish his part of the capital, so that the other was obliged to raise all the money needed, and also had the entire charge and supervision of the work; *held*, the profits being $140,000, that the latter was justified in crediting himself with $1,000 per month as salary.

This was a suit in equity by John McMullen against Lee Hoffman to compel an accounting for profits made by the parties on a joint contract under which they constructed a pipe line for the city of Portland.

In delivering his opinion Bellinger, District Judge, at pp. 548-9 said:

"* * * The defendant refused to account to the plaintiff for any part of these profits, upon the ground that the agreement for a joint bid tended, under the circumstances, to lessen competition, and operated as a fraud upon the city, and therefore will not be enforced in equity, and upon the further ground that the complainant wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement to share the earnings of the contract with complainant was made. In this case the contract was in fact the joint contract of these two parties. However immoral the means by which the award of that contract was secured to them, it does not lie in the mouth of either to dispute upon such grounds the right of the other

to share in the profits of that contract. This principle has been applied where the contracts were to do what was forbidden by law or by public policy, and were executed, although in this case the contract was to do a lawful thing. It is only when the fund is the result of an immoral transaction that contribution between the wrong-doers will not be enforced. If the means by which this contract was procured are immoral, this would be a good ground for a refusal by either party to proceed with it, or for a refusal by an injured party to abide by its conditions. Nor is it a case where one party seeks to enforce an illegal agreement for a share in the profits of a contract held by another, as was my conclusion when the case was considered upon exceptions to the answer. The contract with the city was, as between the parties, the contract of McMullen and Hoffman. It makes no difference in whose name it was taken, although, in fact, it was taken in the name of neither, but in that of Hoffman and Bates, for the benefit of Hoffman and McMullen. The case is not in the least different from what it would be if the suit was by Hoffman against McMullen for a division of moneys received from the profits of this contract by the latter.

"When these questions were considered by me on the exceptions to the answer (69 Fed., 509), I was of opinion that it was within the principle of those cases involving agreements for a division of the fees of public officers and for compensation for services in lobbying. This, I am convinced, was an erroneous view of the question. In one of those cases the Court is asked to compel by its judgment the very thing prohibited by public policy, while in the other it is asked to compel pay for a service forbidden by such policy. The question of division of profits between two parties having equal rights is a very different one. The distribution of the profits of this contract, which are as much the property of one of the parties as of the other does not violate any rule of morals or of public policy. * * *"

30 Mich., 474.

Subject: Rule after Contract Consummated.

In *Willson* vs. *Owen*, 30 Mich., 474, members of an illegal horse-fair association seek to recover moneys thus illegally made from the treasurer thereof. Cooley, J., read the opinion of three out of the four judges, in the course of which he said (page 475):

"We also think the court below decided correctly in overruling the objection to the action on the ground that the moneys were received in the prosecution of an unlawful undertaking. It is true that the trials of speed for money at the horse fair, and the selling of pools under the auspices of the association, were illegal; but there is no illegality in the promise, express or implied, of the defendant, to pay over to the plaintiffs the money received for them from whatever source derived, or from whatever transactions springing. In *Bronson Agricultural, etc., Association* vs. *Ramsdell*, 24 Mich., 441, the attempt was made to enforce the illegal contract by a suit to recover the moneys promised by it; but this suit involves no such attempt. The illegality of this association only appears incidentally in explaining whence the moneys were received; but the ground of recovery is that the moneys were received for the plaintiffs, and it is not material how or on what account they came to his hands, if in fact for the plaintiff's use, * * * *."

43 Miss., 641.

Subject: Rule after Contract Consummated.

In the case of *Gilliam* vs. *Brown*, 43 Mississippi, 641, one of two partners engaged in traffic, admitted to be illegal and contrary to public policy, had possessed himself of all of the proceeds of the traffic, and the other sued for his share.

The last two propositions of the syllabus are as follows:

"9. Illegal Contract.—New Consideration. It is a general principle that if the contract grows out of an illegal act, a court of justice will not enforce it. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act. A new contract resting on a new consideration, although in relation to property, respecting which there had been unlawful transactions between the parties, is not of itself necessarily unlawful.

"10. Illegality of Executed Contract, no Defense.—It is well settled that after the illegal contract has been executed, one party in possession of all the gains and profits resulting from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law."

In the course of its opinion, the Court, pages 659 to 661, said: "The grave question is, where profit and gain has accrued from this unlawful traffic, and these gains are in the hands of an agent, can he be called to account in a court of law by his principal. If the plaintiff, W. T. Brown, permitted his brother J. C. Brown, to take his cotton into Memphis, and there convert it into money, does not the illegality, and legal turpitude imputed to the transfer and sale, so attach to the act and himself as a *particeps*, consenting to it, as that a court of justice will altogether refrain from adjudicating between the parties, on the ground that *ex turpi causa non oritur actio*. Generally those who violate law in their dealings with one another are left in precisely the condition they placed themselves. As to third persons, injured by their acts, courts are free to give full redress. Those who make the covinous conveyances, and other acts denounced by the statute of frauds and perjuries, are not permitted to apply to the courts for extrication from the consequences of their fraudulent acts, if the grantee prove false to the secret trust reposed in him. It is not disputed that a remedy

will not lie on the illegal contract itself. If J. C. Brown had obligated himself to carry W. C. Brown's cotton into Memphis and sell it, no suit could be sustained for a non-performance. But where the illegal adventure has been accomplished, and the money arising out of it is in the hands of J. C. Brown, or his legal representative, what law is violated, what rule of public policy is infringed, what encouragement is given to the violators of the law, by compelling him to turn over the money to his principal? If the sensualist makes provision for his cast-off mistress, is morality put to the blush by the act, would the legal tribunals frown upon such a contract? It is very aptly said by Lord Mansfield in *Hulman* vs. *Johnson*, Cowp. Rep. 343: 'The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake that the objection is ever allowed, but is founded on the general principles of policy, which the defendant has the advantage of, contrary to the real justice between himself and the plaintiff.' The ends attempted to be reached by the principle is to restrain and discourage a violation of law by withholding a remedy, founded on the illegal contract. Therefore, the law esteems a promise, made in consideration of future cohabitation, to be utterly void; yet a bond or deed made for past cohabitation is good. *Fronniger* v. *McBurny*, 5 Cow. 253; Chit. Cont. 516. In the latter case, the offense against morals was already accomplished. The bond or deed was not the inducement that brought it about.

"The point is full of embarrassment and we have maturely considered it with a view of apprehending some principle that may reconcile the adjudications. The general principle laid down in a great number of cases is to this effect: That if the contract grows out of an illegal act, a court of justice will not enforce it. But if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act. A new contract founded on a new consideration, although in relation to property respecting which there had been unlawful transactions between the parties, is not itself unlawful. *Armstrong* v. *Toller*, 11 Wheat, 269; *Craig* v. *Missouri*, 4 Pet. Rep.; *Roby* v. *West*, 4 N. H. 290; *Patterson* v. *Nicholas*, 3 Wheat, 204; *Wooden* v. *Miller*, 7 S. & M., 385.

"It has been observed that the test, whether a demand connected with an illegal act, can be enforced, is whether the

plaintiff requires any aid from the illegal transaction to establish his case. *Simpson* v. *Bloss*, 7 Taunt., 246; *Roby* v. *West*, 4 N. H., 290. Subjecting the case at bar to this test, and it is manifest that the demand of W. T. Brown, against his brother's estate, must be traced back to the illegal traffic in the cotton; putting the claim in the simplest form of speech, and it takes this legal form. There was no express contract that J. C. Brown would account and pay over to his brother the proceeds of the cotton passed through the military lines and sold, nor was there a subsequent promise that he would pay the money thus realized. It comes to this, then, that by his so removing and selling the cotton with the consent of W. T. Brown, the law implied a promise that he should pay for it. The law will never imply a promise where an express promise would be invalid, or would not be enforced. If J. C. Brown had made an express promise that he would take the cotton to Memphis, sell it, and pay the proceeds to his brother, such contract would have been an engagement to violate law and duty, and no suit could be maintained upon it. It is conceded that W. T. Brown had no right of action grounded on the refusal of J. C. Brown to comply with his agreement to remove and sell the cotton. But the other member of the fact is, that he will account for the proceeds. To allow a suit on this, would be to give effect to the illegal bargain. This is hardly, then, a case where a subsequent contract relates back and attaches itself to the original illegal act, for the only contract shown to exist, if any, is such as the law will imply."

And on page 664 the Court further said:

"So long as an illegal contract is, *in fieri*, in the course of execution, neither party can have a remedy grounded upon it, either for its specific enforcement, or for damages for any breach of it. *Russell* v. *Wheeler*, 17 Mass., 281; *Shaffner* v. *Gordon*, 12 East, 304.

"But the principle seems to be well established that after the illegal contract has been executed, one party in possession of all the gains and profits resulting

from the illicit traffic and transactions, will not be tolerated to interpose the objection that the business which produced the fund was in violation of law, and therefore, the plaintiff, jointedly interested in its profits and gains, cannot ground any claim to an account and share thereof. All the harm that can inure to the public by an infraction of the law, has already accrued; and it were to encourage hypocrisy and gross dishonesty to permit a party fresh from a violation of the law, to set up his own turpitude as a shield and protection against the division of the gains of the illicit business with one jointly entitled to share them.

"It is patent to observe the struggle of the courts, and a gradual advance to escape from the unjust consequences of the universal application of an acknowledged principle, and the distinctions, not always palpably suggested by a sense of justice, to except special cases. In the earlier cases, if the money (the fruit of the unlawful business) was deposited with a third person for the plaintiff, this was treated as a collateral contract, and he was not permitted to defend on the ground of the illegality of the original act. As put by Justice Buller on the broad premise, that the moment the money passed into the stranger's hands, he held it as trustee for the plaintiff. As stated by the Supreme Court in *McBlair* vs. *Gibbes*, 17 How. S. C., 236, an implied promise, arising out of the receipt of the money was a new contract not affected by the illegality of the original transaction. It was further enlarged or illustrated, as in the case of several engaged in stockjobbing gambling, when one paid all the losses and took from the other his obligation for his contributory part. All were implicated in the illegal act, and no third person intervened as stake holder or trustee. A further extension was made when one who had collected the winnings at a game of hazard was compelled to pay a moiety to his associate in the winning. After pushing the principle thus far, it were easy to afford relief to a partner against his co-partner who had taken to himself all the profits of a business forbidden by Legislative enactment. Within the range

of the same doctrine is embraced the case of him who confides his money or his property to another, to be embarked in an illegal traffic, after the dealings are over and the business ended; that the money realized shall be regarded as had and received for the plaintiff's use and an implied *assumpsit* to account for it.

"Whilst affording this relief the courts are not obnoxious to the imputation of giving effect to illegal contracts or encouraging immoral acts. In all these cases the violation of law has already been accomplished, and one party is found in possession of money which belongs to another, and no detriment can arise further by raising an *assumpsit* to pay it over to the principal.

"In some of the cases closest in analogy to the one under consideration the suits were in chancery. This can make no difference, for a court of equity will no more lend its aid to an iniquitous transaction than a court of law, and a plea of 'illegality' or *contra bonos mores* is just as available in the one jurisdiction as the other."

42 Am. St. R., 353.

Subject: Rule after Contract Consummated.

In *Martin* vs. *Richardson*, 42 Am. St. R., 353 (94 Ky., 183), the first and third paragraphs of the syllabus, as published in 42 Am. St. R., are as follows:

"Contracts growing out of illegal transactions—Lottery tickets.—One who purchases a lottery ticket in violation of law may recover the proceeds of a prize drawn by it from one who has collected such proceeds after having fraudulently obtained the ticket from such purchaser in exchange for another worthless lottery ticket after the former has drawn the prize."

"Contracts—Validity of when springing from illegal transactions.—If an act in violation of law is already committed, a subsequent agreement, which, though founded thereon, constitutes no part of the original inducement or consideration for the illegal act, is valid."

At page 356, Am. St. R., 94 Ky., page 190, the court said: "Instead of an 'agreement' between the parties, founded

upon alleged illegal acts, we have in this case an implied obligation raised by law to refund moneys fraudulently received and withheld. For other authorities to the same effect, see *Farmer* vs. *Russell*, 1 Bos. & P., 295; *Willson* vs. *Owen*, 30 Mich., 474; *Rothrock* vs. *Perkinson*, 61 Ind., 39."

"The Little Louisiana Lottery concern was, under the pleadings in this case, an institution operated under lawful authority, and the defendant, in presenting the ticket in question, and in collecting the plaintiff's money, may be regarded as acting as his agent, and as collecting for his use. The law implies an obligation to refund the money, which is subsequent to and disconnected with the alleged illegal acts of buying, selling, or exchanging the tickets."

It is clear from an examination of the cases, especially *Tennant* v. *Elliott*, I. B. & P., 3; *Farmer* v. *Russell*, I. B. & P., 29; *McBlair* v. *Gibbes*, 17 How., 232; *Martin* v. *Richardson*, 94 Ky., 183, 190; 42 Am. St. R., 353, 356; and *Gilliam* v. *Brown*, 43 Miss., 641-666, that an implied promise,—arising out of the receipt of the money from or the proceeds or results of an illegal contract, in contemplation of law, constitutes a new contract upon a new consideration, necessarily subsequent to the original contract and not affected by its illegality. The case last cited embodies a very able and philosophical discussion of this position, and it is hoped the Court will carefully consider it, if indeed it shall deem any extended examination of authorities necessary in the premises.

The statement of the doctrine in *Planters Bank* v. *Union Bank*, 16 Wall., 483–500 (part of paragraph 5 of syllabus), is also suggestive and admirable. "Though an illegal contract will not be enforced by courts, yet it is the doctrine of this Court that, where such a contract has been executed by the parties themselves, and the illegal object has been accomplished, the money or thing which was the price of it, may be a legal consideration between the parties for a promise express or implied, and that the Court will not unravel the transaction to discover its origin. * * *" On page 500, the Court, in reviewing the earlier English cases which originated the doctrine, says: * * * "We are aware that *Falkner* v. *Reynous*

and *Petrie* vs. *Hannay* have been doubted, if not overruled, in England, but the doctrine they assert has been approved by this Court * * *"; for which position only three cases are cited in the opinion, to-wit: *Armstrong* v. *Toller*, 11 Wheat, 258; *McBlair* v. *Gibbes*, 17 How., 233–236, and *Brooks* v. *Martin*, 2 Wallace, 70; but, see also the decisions of this honorable Court, in *Kinsman* v. *Parkhurst*, 18 How., 289; *McMicken* v. *Perin*, 18 How., 507; *Planters Bank* v. *Union Bank*, 16 Wall., 483-499-500; *Union Pac. R. R.* v. *Durrant*, 95 U. S., 576–8; *Armstrong* v. *Am. Exch. Bk.*, 133 U. S., 433–4, 466–7; *Farley* v. *Hill*, 150 U. S., 572, 575–6, and *Burck* v. *Taylor*, 152 U. S., 688. See also *Burk* v. *Flood*, 1 Fed. Rep., 541–548; *W. U. Tel. Co.* v. *U. P. Ry. Co.*, 3 Fed. Rep., 423–7; *Kingsbury* v. *Burrell*, 151 Mass., 199.

Opinion of Circuit Judge on Appeal.

It would appear that the learned Circuit Judge sitting in the Circuit Court of Appeals failed to distinguish the real principle to be deduced from the authorities bearing upon this point and to apply it fairly to the complainant's case. On pages 141–142 he says:

"In that case (*McBlair* v. *Gibbes*), and in all the quotations cited to support it, the cause of action was not the illegal transaction, the void act, but a subsequent independent contract which the law raised. The difference is between enforcing illegal contracts and asserting title to money derived from them. * * *"

"In the case at bar the entire cause of action is on the agreement, which is void through public policy. The complainant depends altogether upon that agreement, and seeks to set aside everything that has been done, and to enforce the specific performance of that agreement. He ask the Court to 'enforce this illegal contract, and requires the aid of the illegal transaction to establish his case.'

"It follows that the contract under consideration can neither be enforced nor made the basis of any relief in a court

of equity. The maxim *in pari delicto* applies. The Court will leave the parties to such a contract precisely where it finds them. * * * *"

We respectfully submit that the learned circuit judge is in error. The authorities above cited and discussed show our understanding of the doctrine, and the doctrine especially of this honorable court, upon this subject. While the basis of recovery in such cases is indeed what the learned circuit judge terms a "subsequent independent contract":—it is neither necessarily nor usually an express contract, nor is it a new contract except that as implied, it must necessarily supervene after the illegal contract has been executed by the parties themselves. The mere fact, however, that the parties expressly agreed to a fair division certainly will not weaken the claim of either to such division—*i. e.*, the law which in such circumstances would imply a promise to divide will certainly not refuse to enforce an express promise and agreement between the parties to this effect, as was said: *Gilliam* vs. *Brown*, *supra*. "The law will never imply a promise when an express promise would be invalid, or would not be enforced."

It is true that the complainant's bill is not very appositely or felicitously drawn to avail of the relief contemplated by the authorities cited on this branch of the case; yet, while it does ask specific performance of the contract, it does not ask the aid of the Court as to the illegal object of it, if any; it does not ask the Court to compel the defendants to unite with the complainant in the joint effort pledged in the contract to secure the grant of the franchise. No, the contract, *i. e.*, the essential object of it, has already been fully executed and accomplished by the parties, the franchise has already been obtained from the Legislative body, and the illegality, if any, is a thing of the past; but Sheild (and his associates, having full knowledge in the premises), hold the complainant's share of the result, and the bill does ask for an accounting and for general relief,—in terms, "that all proper inquiries may be made, accounts taken and decrees entered; and your orator further prays that he may have and be granted such other, further, gen-

eral and complete relief as may be agreeable to equity and the nature of his case."

Opinion of District Judge on Appeal.

Upon this branch of the case, the learned District Judge expresses himself as follows (but we desire it to be specially noted that he does not feel that the doctrine involved is necessary to the solution of the case at bar, *i. e.*, he holds that the contract between the parties is clearly *not* violative of public policy, which is also distinctly our position), pp. 144-145, printed record:

"* * * * I have not thought it necessary to consider carefully the effect upon this contract of the rule stated by Lord Cottenham in *Sharp* vs. *Taylor*, and approved in *McBlair* vs *Gibbes*, and *Brooks* vs. *Martin*, and other cases in this country, although I am inclined to the opinion that the doctrine there announced is directly applicable. Here the contract to obtain the franchise which is held to be illegal has been consummated, the franchise has been obtained, the aid of the Court is not sought to enforce it, nor can the franchise be in any manner affected by what it may do; the transaction alleged to be illegal is completed and closed, one of the parties is in possession of all the fruits, and the other seems to me to be entitled to recover in an appropriate action his share of the realized profits.

"Public policy requires that men should perform their contracts, and they ought not to be allowed to evade their obligation upon vague and shadowy grounds. If this were a proceeding on the part of the City of Richmond to vacate the charter, on the ground that it was obtained by any corrupt practices or by the suppression of fair competition, the court should lend attentive ear to every suggestion of improper conduct on the part of the promoters, but the judicial conscience should not be awakened for the protection of one who seeks to avoid a contract, of his own seeking, on the ground that it

was immoral, and, therefore, that he has the right to make off with the swag."

In *Bly* v. *Second National Bank of Titusville*, 79 Penn. St. R., 453, the action was upon a note and the defense usury. On page 456 the court, in discussing the rule that courts will not aid one whose cause of action is founded on an immoral or illegal contract, said:

"The rule has sometimes been carried to inconvenient lengths, not because of its unsoundness in itself, but in its application to particular cases. It should be rigorously applied to all unlawful transactions, but not extended so far as to encourage violations of contracts for payment of honest debts as between the parties, because they grow out of tainted originals. If the taint of the original vitiated every contract growing out of it, however remotely connected with it, it would give protection to fraud upon individuals without compensation in the benefit of the public."

We know not how better to close the discussion under this general head of "public policy" than—by adding to these philosophical and balanced words the yet more impressive and memorable declaration of Sir George Jessel, in *Registering Co.* v. *Sampson*, L. R., 19 Eq. Cases, p. 465, already above quoted: "* * * if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice:—and then, by placing along side these two expressions of the majestic morality of the law, the golden utterance of Lord Watson, in the House of Lords, in *Nordenfelt* v. *Maxim Co.*, 1 L. R., App. Cases (1894), 535, 552— * * * But it must not be forgotten that the community has a material interest in

maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in restraint of trade."

Though not perhaps in all respects strictly apposite, it may serve yet further to illustrate the lofty indignation, and the irresistible effect of that indignation upon the judgment, of a great English jurist, to quote what Lord Macnaghten said in the same great case (1st. App. Cases, 573), in commenting upon the case of *Whittaker* v. *Howe*, in which the facts were that the defendant had sold out to the plaintiffs his large and lucrative practice as a solicitor, accompanied by a covenant that he would not practice on his own account either in England or in Scotland. When sued for the breach he pleaded that his contract was void, being in restraint of trade as "*against public policy.*" Lord Macnaghten says:

"I cannot think that *Whittaker* v. *Howe* requires much explanation. * * * * * * * * * He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practice on his own account in England or Scotland. In order to hold the business together his name was kept in the firm and he remained in the office, drawing a handsome salary. Then there was a quarrel; and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighborhood, and he tried to steal the business he had sold. His defense was that a covenant so wide was against public policy. But it did not occur to him to return the price: that he kept in his pocket. Lord Langdale thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honorable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: Would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? * * * * Lord Langdale held, on the evidence before him, that

the restraint was not unreasonable, although it extended to the whole of England and Scotland."

It is noticeable that in the Nordenfeldt case itself, so great, so resistless, was the pressure of morality against the arbitrary and technical rules of the law, that the House of Lords held the collateral covenant Nordenfeldt had given to the Maxim Company, to whom he had sold the right to manufacture his marvellous gun, to be reasonable and valid, although it restrained the original inventor and patentee from manufacturing the gun anywhere throughout the known world.

We have above conceded, at least by implication, that the strictures of Lord Macnaghten upon the conduct of Howe might not be entirely appropriate to the conduct of the defendant in the case at bar; and yet, when it is remembered that this case is being tried upon demurrer, that the only conclusion legally warrantable from the facts, so far as yet developed, is that the defendant in open violation of the provisions of express contract, faithfully executed on the part of the plaintiff, have not only defiantly refused to comply on their part, but have brought forward, as the chief excuse for this refusal, what the greatest judges who ever set upon the English bench have characterized as "a mean defense," and what is undeniably a confession of equal guilt combined with a claim to hold all the profits of the wrong doing:—we say, when these features of this case are recalled, we are content to leave it to the Court to make its own application of the indignant sarcasm of the great Law Lord.

We submit the case upon the Public Policy defense.

REMEDY AT LAW.

Has the complainant a plain, adequate and complete remedy at law?

This is the second and only other real and live question before the Court.

In attempting to answer it, let us first enquire:

I.

WHAT IS THE COMPLAINANT'S CASE?
WHAT EQUITABLE FEATURES DOES IT PRESENT?
WHAT ARE HIS RIGHTS AND WRONGS OF WHICH LAW WILL NOT AFFORD HIM REDRESS OR REALIZATION AND RELIEF AS PLAIN, ADEQUATE AND COMPLETE AS EQUITY?

We insist that his essential rights are Specific Performance and Accounting as incident thereto: Specific Performance of the contract of August 9th, 1895, so far as the same is yet unexecuted—i. e., so far as involves the complainant's rights under said contract to a one-half interest in and ownership and control of the Traction franchise and enterprise. Upon a view of the plaintiff's entire case as it stands before the Court on demurrer, there would seem to be no reasonable or substantial doubt as to this.

The defendants, on the other hand, contend that this is neither the exact phraseology nor yet the fair construction of that contract, which, in terms, is nothing but an agreement

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The decree of the Trial Court (pages 119-120, p. r.) dismissed complainant's bills without any reservation whatever. The decree of the Circuit Court of Appeals, affirming said decree, provides (page 146, p. r.) that—"it is now here ordered, adjudged and decreed by this Court that the decree of the said Circuit Court in this cause, be, and the same is hereby, affirmed, without prejudice, with costs."

It is respectfully submitted that the words—"without prejudice," in the connection thus used, do not reserve to the complainant the right to sue at law.

" to divide equally * * * whatever may be realized from the enterprise "—realized, probably, by a speculative sale of the franchise and division of the proceeds: that this contract, looking only to and providing only for a division of money profits, a violation of it sounds only *in damages:* and therefore Law is the natural and exclusive forum for the trial. They further contend that, at the least, the wording of the contract is not plainly in harmony with our views, and that a contract *not certain in its provisions cannot be specifically enforced.*

Meaning, Substantial Certainty, and Mutuality of the Contract of August 9, 1895

But how is the true meaning of a contract to be determined? Manifestly, the rule requiring "certainty" in the terms of a contract, to entitle the parties to specific performance of it, does not intend such certainty as to exclude all use of the ordinary canons of construction: for these canons are constantly applied by the courts in determining the proper construction of contracts of which specific performance is enforced.

The just and true construction of a contract is often best arrived at, and its meaning best understood, by reference to the circumstances in which it had its origin, *i. e.*, by letting the Court into the situation of the parties at the inception of the contract—as also by the contemporaneous construction of their contract by the parties themselves.

We do not claim that Hyer's construction of what the contract of August 9th entitled him to, is admitted by the demurrer or binding upon the Court as the sound legal construction; but if, before Hyer had any contract with Sheild or his associates, he intended and proposed to build the Broad street road, and was preparing to do so as best he could, when he met Sheild, then this fact has a pregnant bearing upon the question what the parties meant by the language employed in said contract of August 9th. Unless some reason is given for a different view of the matter, there is every reason to infer that Hyer's con-

nection with and interest in the Traction franchise and enterprise, under his contract with Sheild, was of the same nature as his connection with and interest in the Conduit franchise and enterprise prior to that contract. The facts as to the history of his Conduit franchise and enterprise, and his relations to it, are set our in the plaintiff's bill, and these facts must be regarded as admitted upon demurrer, and their force and bearing as above set out cannot be denied. So what Hyer said and did under and in connection with the contract of August 9th, and what he alleges that Sheild said as to his understanding of that contract—are facts, and must be admitted by the demurrer. Even the claims which Hyer put forth, as to his rights under the contract of August 9th, "*dum fervet opus*," while they are not admitted by the demurrer to be valid, and cannot, of course, override the court's construction of the contract, yet they are facts, and as such, have an important bearing upon that construction.

It may be well to add that where, as a matter of pleading, it is necessary to charge a certain purpose and intent—*e. g.*, the intent in a grantor to "hinder, delay, and defraud creditors or other persons," there, the charge of such purpose and intent is the essential thing, and while the demurrer does not admit its truth so as to preclude subsequent denial and contest, yet the truth of such charge—upon demurrer—is admitted, *in so far as requisite to give the Court jurisdiction.*

Note, then, what the plaintiff says of these matters in his bill: *e. g.*—in the last paragraph, on page 4, as to the inception of the Broad street project in his own mind—on pages 5 and 6, that, "He had given substantial and satisfactory guarantee, indeed precisely the guarantee required, of the good faith of himself and his associates of the Richmond Conduit Railway Company and their earnest purpose to build the road";—at the top of page 7 that, "During the early part of August, 1895, your orator was in the city of New York, engaged in perfecting his arrangements for prompt and vigorous action under his Conduit ordinance, as soon as it should be satisfactorily amended:"—on page 10, "Sheild stating sub-

stantially that it was an agreement providing for a consolidation of interests: each party to have equal ownership and control in the enterprise and an equal share of profits;"—on page 11, concerning the arrangements between the parties as to the names of the incorporators; on page 13, that, "he was detained one day in New York, in perfecting his preparations for vigorous prosecution of the joint enterprise,"—on page 16, his published "Interview" states "that he had a contract with the Traction Company for one-half interest of their franchise, when such franchise was granted;" and on page 20, his formal "Notice" "claims to be entitled to a full one-half interest in the franchise."

Can any unprejudiced mind, viewing the case as it must be viewed upon demurrer, doubt that Hyer's idea and purpose all along, were to build the Broad street road, or that he sustained to *the Conduit franchise and enterprise*, in the fullest measure, the relation of permanent interest, ownership, and control? And what is there to show that his relation to and interest in the *new* franchise and enterprise were different? Of course, the amount and proportion of his interest were lessened one-half; but we insist that this is the only change which can reasonably be inferred from the history of these transactions and from the face of the bill. There can be no sort of difficulty therefore in arriving at the contract of which the plaintiff claims and asks specific performance.

If we have no rights, there is an end of the discussion. But, what if we were and are *justly entitled* to the rights we claim under the contract of August 9th, 1895? And what if (as is undeniably true), the defendants were, repeatedly and fully and in good time, *notified* of these claims and rights? And what if (as is further undeniably true), the defendants, thus notified, contemptuously scouted our claims; either taking the chances that they would turn out to be baseless, or relying upon the very argument and appeal which they are now making before this Court, to-wit: that it is inconsistent and unconscientious in the plaintiff to claim an interest in the franchise

and yet seek to undo and destroy what has been done in execution and development of it.

If what the Traction Company and its promoters have done—in the way of subscription to and issue of stock, organization and action of the Company, execution of bonds and creation of incumbrances securing them—is *to stand*, without regard to the question *whether or not the plaintiff has rights* which will thereby be denied him; why then of course these rights are gone, and we ought at once humbly to beg pardon for complaining at all before a Court of Equity. To our humble comprehension, therefore, it would seem to be merely a question *whether or not we had and have rights in the premises, and whether we gave due notice of them*, and, in this connection it must be remembered that, most if not all the things done by the defendants, have been done not only *after notice given*, but actually *after bill filed and process served*.

Certain parts of this contract of August 9th, would doubtless have proved, if the attempt had been made, very difficult to enforce. Co-operation in a partnership enterprise is an awkward thing to compel, but neither side, in the case at bar, has asked anything of the sort, for the very good reason, that before the bill was filed, the co-promoters and contracting parties had succeeded in the objects of their co-operative effort, to-wit: procuring a franchise for the construction of a street railway on Broad street, in the city of Richmond, Virginia. But, the basis of the antecedent considerations upon both sides being complied with, one side was and would have been equally as compellable as the other to let that other into a one-half interest in the franchise and enterprise. It was not properly a contract upon Sheild's part that he would give Hyer a one-half interest in his Traction franchise (at the time he had none) if Hyer would do certain things. They met as equals; both were to co-operate, and certain specific services were to be and were rendered by Hyer: but beyond this co-operation and these services, Hyer and Sheild, each for his side, agreed that they would share equally in the enterprise. Neither side ac-

cuses the other, so far as the record shows, of any failure of co-operation. No such phase of the agreement is before the Court. We come then to *the contract obligation, which we do ask should be specifically enforced.* What was it but a contract of equals that they would share equally? If Hyer had eliminated and excluded Sheild from participation in the partnership enterprise, the contract of August 9th, would have been just as enforceable in Sheild's behalf as we claim it now to be in Hyer's.

The contract of August 9th shows upon its face that we were required to furnish, and did furnish, the $10,000 deposit, which was the basis of the Traction Company's application for its franchise; and also that the Traction side of that contract regarded itself as having entered into the benefit of the labors and the outlay of both sides anterior to the contract.

Failure to Subscribe to Stock.

We certainly are not to blame for not having hitherto subscribed, or offered to subscribe, to the stock of the Traction Company. That stock was all taken (at least nominally) before we ever knew that the subscriptions were desired or could be made. Indeed, it sufficiently appears from the record that no subscriptions were desired from our side, and that none would have been received. The amended and supplemental bill makes the following charges in this regard (pages 99–100 p. r.):

Extract From Bill.

"Your orator has been informed and believes and therefore charges that, prior to and at the time of the said subscriptions, each, all and every of the said subscribers for the capital stock of the said company had been put upon inquiry as to the rights of your orator afterwards set out in his original bill, and inquiry by them, or by either of them, would have disclosed to them, and to each of them, all the facts afterwards set out in said bill; that, indeed, each, all and every of the aforesaid subscribers had actual notice and knowledge of all your orator's

said claims and rights, as afterwards set out in his said original bill, at the time of and prior to their said subscription.

"And your orator now further and distinctly charges that said subscriptions were made without his knowledge, without notice to him of said meetings, or of said subscriptions; without any opportunity to him to subscribe to the capital stock of said Richmond Traction Company, and with the design of excluding him from any opportunity to subscribe for any part of the said capital stock, and with the purpose of excluding him from any participation in the stock of said company, or its organization, or the determination of its policy.

"Your orator has been further informed, believes and therefore charges, that no payment whatever was actually made at the time of subscribing or at any time subsequent thereto, by any or either of the said subscribers, for the capital stock of the said company; that any pretended payment in money or by checks or otherwise made at any time or in any form by said subscribers or by any or either of them, for the said capital stock or any part thereof, or any pretended passing of a consideration of any character to the said Richmond Traction Company, from the said subscribers or any or either of them, in payment for the said stock or any part thereof, were fictitious, and were wrongful and unlawful attempts to evade the laws of this Commonwealth; and your orator has been further informed, believes and therefore charges that, since the time of their said subscriptions and without any lawful or valid payment from the said subscribers, or either of them, certificates, purporting to be for fully paid up stock of the said company, have been wrongfully and illegally issued to the aforesaid subscribers for the amounts of their respective subscriptions."

What we claim is, that the franchise be disencumbered of all that has been put upon it without our concurrence and to our prejudice. When this shall have been done, then the parties to the contract of August 9th must have an equal voice in the course to be pursued, the amount of stock to be issued, how to be paid, and then to the receiving of sub-

scriptions in a legal manner and with due regard to the contract rights of each side to subscribe. It may be well here emphatically to state, that we never claimed to be entitled to paid up stock of the company, without in some legal and proper way paying for it.

Defendants' Position a Mockery of Justice.

It would be a mockery of justice and of the dignity of the Courts, if one party to a contract, after being served with notice of the rights and claims of the other party thereto, and even after being served with process in a suit brought to enforce these rights and claims, were to be permitted deliberately to place himself in a position where specific execution of the contract would be very inconvenient to him, and then be heard to plead that the remedy by specific performance should not be enforced, because his "situation" was such that the remedy would prove "harsh and oppressive."

If it be replied:—But, we were compelled to proceed at once to carry out our franchise under penalty of forfeiting it, then we rejoin:—It nowhere yet appears upon the record, what the situation of the company really is: therefore demurrer is not the stage of the cause, at which to make a test of this defense: besides, having gone on, after notice of the defendants' claims, upon the theory that they were without foundation and upon the statement that you had looked into the matter and were entirely willing to take all the risks, you must now stand all the legitimate consequences of the fullest realization of whatever rights it shall turn out the plaintiff was at the time entitled to.

The more we examine the case the better we are satisfied, not only that the contract of August 9th, 1895, embodies every essential requisite to entitle the parties to a decree of specific performance, and that such a decree is practically the only remedy the plaintiff can have, which will even approach adequacy and completeness, but, also, that the defendants, at this stage of the cause, at least, are in no position to resist the entry

of such a decree, having introduced no evidence to show that or how they would be damaged by specific performance of their contract to divide with us—indeed, having, as yet, not even made the point in pleading.

II.

The Law as to Jurisdiction in Equity.

The accomplished Judge, who sat in the trial court, declared in his opinion, filed August 5th, 1896, record pages 116–117, that the complainant was rightly in a Court of Equity. Speaking of defendants' demurrer to complainant's bill, as last amended, this able jurist said:

"The third reason assigned is that the complainant has a plain, complete and adequate remedy at law, if any he has, against the defendants in the case made by the bills. I (do) not concur with counsel for the defendants in the argument submitted on this point, and, so far as it is concerned, the demurrer must be over-ruled. In my judgment, in cases of this character, where specific performance is claimed, complete and adequate remedy can only be had in a Court of equity."

The rule is stated in Story's Equity Jurisprudence as follows:

"33. Perhaps the most general, if not the most precise, description of a court of equity, in the English and American sense, is, that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law. The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief, and secure the whole right of the party in a perfect manner, at

the present time, and in future; otherwise equity will interfere, and give such relief and aid, as the exigency of the particular case may require." * * *

3 Peters, 213.

Subject: Jurisdiction in Equity.

In the case of *Boyce's Executors* vs. *Grundy*, in 3 Peters, 213, the Supreme Court of the United States said:

"This Court has been often called upon to consider the sixteenth section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

21 How., 582.

Subject: Jurisdiction in Equity.

In the case of *Barber* vs. *Barber*, in 21 Howard, page 582, the same Court said:

"We observe, in confirmation of what has just been said, that the jurisdiction of the courts of the United States is derived from the Constitution, and from legislation in conformity to it. The first limitation by the latter upon jurisdiction of the equity courts of the United States is, that no suit can be sustained in them, where a plain, adequate, and complete remedy may be had at law. The Court has said: 'It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficacious to the ends of justice, and its prompt administration, as the remedy in equity.' *Boyce's Ex'r* v. *Grundy*, 3 Pet., 210; *United States* v. *Howland*, 4 Wheat., 108; *Osborne* v. *United States Bank*, 9 Wheat., 841, 842. * * *"

5 Wall, 78.

Subject: Jurisdiction in Equity.

In the case of *Watson* vs. *Sutherland*, 5 Wall., page 78, the Court said: "It is contended that the injunction should have been refused, because there was a complete remedy at law. If the remedy at law is sufficient, equity cannot give relief, 'but it is not enough that there is a remedy at law; it must be plain and adequate, or in other words, as practical and efficient to ends of justice, and its prompt administration as the remedy in equity.' * * *"

15 Wall., 228.

Subject: Jurisdiction in Equity.

In the case of *Oelrichs* vs. *Spain*, 15 Wall., page 228, the Court said: "The 16th section of the Judiciary Act of 1789 provides, 'that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;' but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not 'plain, adequate, and complete;' or, in other words, 'where it is not as practical and efficient to the ends of justice and to its prompt administration' as the remedy in equity."

130 U. S., 514.

Subject: Jurisdiction in Equity.

In the case of *Kilbourn* vs. *Sunderland*, 130 U. S. 514, the Court said: "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. * * *"

91 Virginia, 688.

Subject: Jurisdiction in Equity.

In the recent case of *Stuart* vs. *Pennis*, 91 Va., 688, the Supreme Court of Appeals of Virginia said: "* * * While the

doctrine is well established that a court of equity will not, in general, decree the specific performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.

"The true equity rule is thus laid down in Story's Equity J., sec. 33: 'The remedy must be plain; for, if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate for, if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require.'

"The remedy at law would fall short in the case at bar, of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. *Where the fulfilment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by Pomeroy in his book on Contracts, sec. 15: 'To compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess.'*" (Italics ours.)

Damages practically no remedy in the case at bar.

Could language be more appropriately impressive than the words last quoted, which we have printed in italics? In their first brief filed upon the argument of the demurrer in the Circuit Court, the defendants' counsel say, of the contract of August 9, 1895:

"If it entitles the plaintiff to anything, it entitles him to a certain sum of money, represented by one-half of the profits

of the Traction Company, realized during its existence, to-wit, from 28th August, 1895, the date of the city ordinance, to 1st January, 1926."

The learned counsel are right—the profits upon the enterprise contemplated by the contract aforesaid, depending, as they evidently do and must, upon the character of the construction, equipment and management of the Traction road, will not be legally or practically determinable prior to the date last mentioned, to-wit: the expiration of the Traction franchise, January 1st, 1926. See record, page 25.

When the plaintiff instituted his suit, all these things were in the womb of the future, as the greater part of them still is to-day. Manifestly, then, the question of profit or loss upon the enterprise is still dependent upon the question whether or not the management and operation of the road are and will continue to be competent, practical and economical, or the reverse.

Who, even to-day, can answer this question? Much less could any intelligent answer have been given to it two years ago, when the contract of August 9th was violated and repudiated by the defendants, and the plaintiff found himself compelled to take action to protect and enforce his rights.

The attempt to compensate his wrongs by money damages would not only be a denial of the plaintiff's most essential rights; but he must either now accept an utterly conjectural estimate, or wait until the expiration of the corporate life of the Traction Company to sue for his possible (equitable) share of the possible actual profits of the enterprise. It is manifest that neither of these alternatives will afford him any real remedy or relief whatever.

Community of Interest: Partnership.

The Contract of August 9th, 1895, created a partnership relation between the parties thereto and affected thereby; and in cases of this character the remedy at law is inadequate.

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93 Virginia, 214.

Subject: Partnership.

In the case of *Jones* v. *Murphy* decided by the Supreme Court of Appeals of Virginia, June 11th, 1896, 93 Va., 214, Cardwell, J., delivering the unanimous opinion of the Court (pp. 215, 218), said:

"This is an appeal from a decree of the Chancery Court of Richmond city, and the case grows out of the following agreement:

"This agreement, made and entered into this 2d day of November, 1889, between Merriwether Jones, of the first part, and S. S. Murphy of the second part.

"Witnesseth: That the Clover Hill Mines and mining property, and (the) land of the late Franklin Stearns, both situated in Chesterfield county, Virginia, have been put upon the market; and the parties to this agreement have agreed that each shall use his best endeavors to sell the said lands, as a whole or in part, and that each of the parties hereto shall receive one-third of the money or other consideration paid, or to be paid for said property above the actual cost paid to the owners, either as a profit or as commissions. The remaining third is hereby agreed to be paid to James R. Werth, Esq. The necessary travelling expenses are to be deducted out of the net consideration or profits.

"(Signed) Merriwether Jones.
"(Signed) S. S. Murphy."

* * * * * * *

(P. 218). "The demurrer raised the question of equity jurisdiction only, and appellant insists that the demurrer should have been sustained on the ground that the complainant's bill did not make a case for equity jurisdiction. We are of opinion that the demurrer was properly over-ruled, as the bill upon its face shows that the agreement under which the parties had

acted made them partners; that there were partnership accounts between the parties which were properly to be stated and settled by a Court of Equity, and that the remedy of the complainant was not complete at law.

"In order that persons may be partners in the legal acceptation of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. An agreement that something shall be attempted with a view to gain, and that the gain shall be shared by the parties to the agreement is the grand characteristic of every partnership, and is the leading feature of nearly every definition of the term. 1 Lindley on Partnership, p. 1; Story on Part., sec. 2; *Ducos & Co.* v. *Hoover &c.*, 25 Fla., 727; *Lengle* v. *Smith*, 48 Mo., 276; *Cothran* v. *Marmaduke & Brown*, 60 Tex., 370.

"In the last named case it was said that it is not essential to constitute a partnership, that the parties are by agreement to share in the losses of the business; it is sufficient if they are to have a community of interest in the profits as such, and that where a party to the agreement was entitled to an interest in the profit, this would entitle him to an account to ascertain the result of the enterprise.

"In the case of *Lengle* v. *Smith*, *supra*, the parties entered into an agreement by which the one was to furnish the capital, and the other his services, the profits to be divided between them, and no special contract was made as to the losses, and it was held that they were partners, and that a Court of Equity was the proper Court for either party to apply to for a settlement of the partnership accounts.

"In the case here the agreement between the parties contemplated and provided for the selling on commission, or the purchase and sale at a profit, of several tracts of land (eight of which were in fact sold to Dininy), which agreement was indefinite in its continuance, the deduction from the net profits, whether these consisted of money or land, of the expenses of

the parties, and the division of these net profits thus arrived at, into three equal parts, one of which was to go to Jones, one to Murphy, and one to Werth. These lands were not to be sold all at once, but could be sold as they were, part at one time and part at another. It provided, in fact, for a series of transactions, involving expenditure of time, skill, and expense by the parties. The parties to the agreement being partners, and the bill showing that of necessity there were accounts to be taken to ascertain the result of the enterprise, the remedy of the complainant was only complete in a Court of Equity.

"In the case of *Smith* v. *Marks*, 2 Rand., 452, this Court said: 'The principle of interference is, that courts of law either cannot give a remedy, or cannot give so complete a remedy as equity.'"

27 Southeasten R., page 432.

Subject: Partnership.

In the case of *Stringfellow* vs. *Wise*, decided by the Supreme Court of Appeals of Virginia, April 15th, 1897, and reported in volume 27, Southeasten Reporter, page 432, &c., Cardwell, J., delivering the unanimous opinion of the Court, at pages 433 and 434, said:

"The Judge" (meaning the judge of the lower court) "held that an agreement between plaintiff and the defendants looking to the formation of a limited partnership was entered into the 23rd day of February, 1891, but was never consummated: that, in anticipation of the consummation of such a partnership, transactions were had on account of the proposed partnership, and advances in the shape of labor, materials, and money made for the use and benefit of the proposed partnership, and certain property and property rights were acquired by it; that, though plaintiff and defendants might be liable as partners to creditors, if any there were, yet as between themselves no partnership actually existed, but their rights, growing out of advancements and labor for the benefit of the proposed partnership, would have to be settled between themselves upon

principles analagous to those adopted in winding up a common law partnership, and the partners themselves would have to be put, as far as possible, in statu quo. To this end the decree of the court appointing a receiver in the cause theretofore entered was set aside, upon the condition that the defendants enter into bond, in the penalty of $1,000, conditioned to restore to plaintiff any property in kind that may have come into their possession, and to pay to plaintiff any sum that might be found due from them, or either of them, to him, upon the settlement of the accounts directed, and the following accounts were directed: An account of the advancements made by either party in money, labor or materials for the benefit of the proposed partnership, and the value thereof; an account of any property acquired or profits from business made by the co-operation of the said parties in the use of the property or means contributed; an account of all property contributed by either of the parties in anticipation of the proposed partnership which remains in kind, together with its value and the value of its use, and any damages which may have been done it in such use. This decree also perpetuated the injunction so far as it restrained the defendants from using the firm name of Wise, Long & Stringfellow, and dissolved it in all other respects."

* * * * * * * * *

"We are of opinion that the decree of October 10, 1894, correctly settled the principles of the cause, and that no injustice was done the plaintiff thereby."

See also: *Canada* vs. *Barksdale*, 76 Va., 899.

As to the exact form of *Relief* to be given: this is really not a matter to be considered upon demurrer, at which stage of the case the question to be decided is—whether the plaintiff be entitled to *any relief* upon his bill? When the facts are fully developed it will be time enough to arrange the details of the relief, and we have done our part in preparation for the entry of a decree giving complete and adequate relief, by bringing before the Court all whom we conceive to be in any event lia-

ble to us; so that the entire matter may be equitably adjusted, according not only to our equities against them, but to their equities as against each other.

Respectfully Submitted,

ROBERT STILES,

ADDISON L. HOLLADAY,

Solicitors and Counsel

for Petitioner L. H. Hyer.

APPENDIX.

The ten grounds upon which the defendants base their demurrer will be found listed on pages 114 and 115 of the printed record. As repeatedly stated in the argument of the cause, both oral and printed, only two of the ten, *i. e.*, grounds III and IV, present questions of any considerable interest or difficulty, and these have already been considered in the brief proper, to which we append—merely out of abundant caution—a brief examination of the remaining eight points, or rather seven only; for a glance will satisfy the Court that grounds I and III (as to remedy at law) are identical.

There remain, then, to be herein briefly considered, as per list referred to, grounds II, V, VI, VII, VIII, IX, and X.

These grounds of demurrer, as we understand them, will be briefly stated, in substance, as hereafter considered.

Ground II of Demurrer.

DEFENDANTS SAY THAT THE CITIZENSHIP OF THE PARTIES BARS THE JURISDICTION OF THE COURT.

This position is so evidently without merit as to have been openly abandoned by counsel, as will appear from the opinion of the Honorable Circuit Judge who presided in the trial court. See record, bottom of page 16.

Ground V of Demurrer.

DEFENDANTS SAY THAT THE BILL IS MULTIFARIOUS AND DE-

FECTIVE, FOR *misjoinder of other defendants* WITH THE DEFENDANT SHEILD.

To which we reply.

1. If any of said defendants be not indispensable parties, their presence may be dispensed with, without affecting the validity of the suit or the jurisdiction of the Court.

2. The bill alleges that Sheild had power of attorney to represent, and did represent, all the parties interested in the Traction scheme at the date of the contract of August 9th, and that all other parties, if any, becoming interested after that date, were put upon inquiry by what occurred—indeed had full notice and knowledge of the plaintiff's rights.

The bill itself embodies interviews and notices calculated to inform all parties interested as to these rights and claims, and shows yet further that the gentleman who is now President of the Traction Company, before the passage of the Traction ordinance, received and publicly acknowledged such notification, and answered the same by avowing thorough examination of Hyer's claims, and by denial and repudiation of them.

3. These parties defendant (other than Sheild), and especially the Traction Company, are proper and even necessary parties, *because they claim an interest in and have possession and control of the subject matter of the suit*, to-wit: the Traction franchise. This fact alone is sufficient, under the fundamental rule determining who should be made parties to proceedings in equity, to require and compel the plaintiff to summon these parties to enter the suit, for the protection of their own rights as well as the realization of his; and

4. These parties defendant, and especially the Traction Company, are bound by the contract of August 9th, 1895. Bound, be it observed, especially the Traction Company, *not* upon the basis of *express contract* made with the Company through the agency of the promoters; *nor* yet upon the theory

of *ratification* by the Company, after it came into existence, of such antecedent contract; *but* rather upon the basis of *equitable* estoppel, implied adoption of the burdens of the contract, by knowingly availing itself of its benefits.

Lord Cottenham discriminated and defended his three or or four great decisions which first applied this doctrine in cases such as that at bar. Courts and text-writers alike, recognize and approve this distinction, and the equitable basis thus laid down for the liability of a company for specific performance of contracts made by its promoters before it came into existence.

The defendants' cited in the lower courts in support of their position, 1 Morawetz on Corporation, Section 547, which is in these words:

"Sec. 547. *Liability of a corporation for the Acts of its Promoters.* A Corporation is not responsible for acts performed, or contracts entered into, before it came into existence, by promoters or other persons assuming to bind the Company in advance. It is clear that the corporation cannot, in such case, be held liable on any principle of the law of agency, for an agency implies the existence of a principal and a delegation of authority from the principal to the agent."

But, our friends failed to read all this philosophical author had to say upon this subject. Only two sections below, occurs the following passage:

"The adoption of an agreement made by the promoters of a corporation may often be implied from the acts or acquiescence of the corporation or its agents, without any express acceptance. After a corporation has knowingly received the benefit of an engagement entered into by its promoters, it will usually not be permitted to deny that it agreed to assume the corresponding burdens."

"A corporation cannot be charged with the acts or contracts of its promoters, by virtue of the technical doctrine of ratification." Sec. 549, pp. 524–5.

In support of the position taken in this latter passage, the

learned author cites, amongst other cases, the decisions of Lord Cottenham above referred to, which have undoubtedly been much discussed and critized, but, as grounded and limited by the great Chancellor himself, they have never been, will never be overruled or repudiated.

Two other authorities cited upon this point in the lower courts by the defendants, to-wit: *Franklin Ins. Co.* v. *Hart*, 31 Md., 59, and *Abbott* v. *Hapgood*, 150 Mass., 252, do not advert to this distinction. But the Massachusetts case raised the question whether the Company or its projectors should sue upon a contract made by the projectors before the Company came into existence. The Court held that the suit should be brought in the name of the projectors, and not of the Company; but added that every one concerned in the case must have known that the projectors, and not the corporation, made the contract. The Maryland case held that one could not be validly appointed secretary of a corporation before it had any existence, and therefore could not have a valid claim for salary as such: but the following extract from the opinion is suggestive: "The appellee has no right of action and cannot recover against the corporation, for services thus rendered or under an appointment thus made, prior to its existence as such; unless it has in some way become legally bound therefor, and of this there is no evidence." Manifestly, the corporation, after it came into existence, took no benefit from the services rendered by the *quasi* secretary, "prior to its existence as such."

The defendants also cited 1 Thompson on Cor. ss. 480–481. It is difficult to see with what view, except that the latter section mentions with approval cases holding that "an agreement by individuals that, when they become incorporated, they will give the other contracting party a certain amount of paid up stock of the corporation" is not binding upon said corporation when it is organized—a doctrine which in no way affects the case at bar. But, it is important to note that Thompson precisely agrees with Morawetz, in his statement of the law upon this subject, the opening clauses of section 480, of Thompson corresponding with section 547 of Morawetz, and

the last clause of section 480 of Thompson, in these words,—"So it may, of course, impliedly ratify such engagements, by accepting and retaining any benefit which accrue to it therefrom, in which case it becomes liable, not on the strict theory of contract, but on the principle of *estoppel*," aswering closely to section 549 of Morawetz.

Both these learned authors cite, in support of the equitable liability of corporations upon these antecedent promoter contracts, the leading decision of Lord Cottenham, to-wit: *Edwards* vs. *Grand Junction R'y Co.*, 1 My. & Cr. 649, the syllabus of which is as follows:

"An incorporated Company will be bound by the agreement of its individual members, acting before incorporation in its behalf, if the Company has received the full benefit of the consideration for which the agreement stipulated on its behalf."

On pages 671–2, the Lord Chancellor thus states the grounds of his decision:

"But then, the railway company contend that they, having now become a corporation, are not bound by anything which may have passed, or by any contract which may have been entered into by the projectors of the company, before their actual incorporation."

"If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon this contract and that Moss entered into a contract, in his own name, to get the company, when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway: it is, therefore, the agreement of the parties who were seeking an act of incorporation, that, when incorporated, certain things should be done by them. But the question is, not whether there be any bind-

ing contract at law, but whether this court will permit the company to use their powers under the act, in direct opposition to the arrangement made with the trustees prior the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld."

Stanley vs. *Chester and Birkenhead Railway Co.* 3 Myl., 773, is another of Lord Cottenham's prominent decisions—but both this case and that last quoted from, as well as every other important authority bearing upon this point may be found ably reviewed in the case of,

Earl of Lindsey vs. *The Great Northern Railway Company* (44 Engch); 10 Hare 643–680, which was decided in 1853. This case is important as containing not only, as above suggested, a full review of the authorities, but also Lord Cottenham replies to his critics, his explanation and defense of his decisions. The last proposition of the syllabus is unusually trenchant and vigorous. It is as follows:—

> "The decision in the case of *Edwards* vs. *The Grand Junction Railway Company* did not proceed on the principle that the incorporated company was

bound by the contract of a party acting as an agent for them prior to their corporate existence, but on the principle, that the Court would not allow them to exercise powers acquired by means of such contract without carrying it into full effect; and, in the absence of any adoption of the contract of such a party by the incorporated company, or of any attempt to exercise the powers thus acquired, or of any part performance, the Court might refuse to enforce specific performance of such a contract against the incorporated company; but, if they adopt or avail themselves of the contract, or exercise the powers acquired by its means, the Court will in that case, not only negatively, but postively, interpose and compel specific performance by them of every portion of the contract."

In the Vice-Chancellor's opinion, on page 658-9, occurs this remarkable passage: "What Lord Cottenham fastens on is this. He says: 'If you acquire powers through the medium of the contract, so entered into by any one who at the time was promoting that measure of which you afterwards reaped the benefit, you shall not exercise any one of those powers without giving full effect to all the arrangements and agreements of that party,'—agent he cannot be called. But the result of that doctrine goes further than the Solicitor-General urged, for he would rather have placed it in this position: He said, you can only negatively restrain certain acts from being done; you cannot positively enforce the performance of any acts to be done. I apprehend the doctrine goes to this extent. It is, in one sense, negative; that is to say, the Court will not interpose by this species of jurisdiction, unless you, the company, are availing yourselves of certain powers which you have thus acquired; but that preliminary condition of interference having once taken effect, you having asserted and exercised those powers, all the other consequences follow positively, and you shall perform every branch and portion of your agreement, and not be

merely negatively restrained from doing acts which, in another sense, are contrary to that agreement."

See also:

Frankfort S. & T. Co. v. *Churchill*, 6 J. B. Mon. (Ky.), 428.
Grape S. & V. Manuf'g Co. v. *Small*, 40 Md., 400.
McLaughlin v. *Concordia College*, 20 Mo. App., 46.
Low v. *Railroad Company*, 46 N. H., 284.
Burrows v. *Smith*, 10 N. Y., 566.

It may not be improper to remark, that, while confident of the justice and soundness of what has just been said, it is yet, perhaps, not essential to the establishment of our position; because the case at bar is not, as were most of the cases in the books, essentially and exclusively a case in which a recovery is sought against the Company by virtue of the contract. The plaintiff here claims, rather, that he had a right to be and should have been in and of the Company, and, as such entitled to part ownership and control of the franchise of which the Company, so organized as to exclude him, claims and has exclusive possession. Therefore, our position taken above, and especially, that the Company is not improperly joined as party defendant in this suit, is sound. We could not possibly maintain this suit without calling the Company in.

While not expressly mentioned in the list referred to, pages 114 and 115 of the record, the defendants yet argued orally and in print in the lower courts that the bill was defective and demurrable, for

Misjoinder of Causes of Action.

We submit the bill is clearly not defective upon this ground. The facts set out are parts of the connected history of one transaction or series of transactions, brought to the notice of the Court, as the basis of one right and claim of the plaintiff, and all the relief asked is subservient and incidental

to the effectuation and realization of this one right and claim.

Nothing is more fundamental or familiar than the power and the practice of Courts of Equity to grant other reliefs sought, and especially damages, in addition and as *ancillary or supplemental to* the specific execution of a contract, and scarcely less familiar is the power and practice of these Courts to award damages *in lieu* of specific performance where, for any reason, this particular relief cannot be decreed.

Ground VI of Demurrer.

DEFENDANTS SAY THAT THE BILL IS DEMURRABLE FOR *Non-Joinder* OF THE ASSOCIATES OF THE PLAINTIFF, JOINTLY INTERESTED WITH HIM IN HIS ALLEGED CLAIM AND CAUSE OF SUIT.

There is nothing in this contention. The rule and principle of equity jurisdiction which the defendants seek to apply is not properly applicable. It is true that, *before final decree* an assignee must prove his assignment and, if required, bring in his assignor; and it is also true, that one who sues as assignee only, and assignee of a merely legal claim upon which there is a plain, adequate and complete remedy at law—is not entitled to sue *in Equity*, upon the ground merely that he cannot sue at Law, *in his own name*; but, in the case at bar,

(A) The plaintiff is not the assignee of a merely legal claim, but his assignors themselves clearly had the right, if they had not assigned, to go into a Court of Equity.

(B) Moreover, the plaintiff sues not only 'as assignee,' but, as the bill shows, has rights and interests in the premises originally *his own*, and, in such a case, the proper practice is *not* to dismiss the plaintiff's bill, but if necessary to the proper disposition of the suit, to bring in by amendment those interested with the plaintiff in the subject matter.

Ground VII of Demurrer.

DEFENDANTS SAY THAT QUO WARRANTO IS THE APPROPRIATE REMEDY.

We are at a loss to appreciate this position. If what we sought was the forfeiture of the Traction franchise, then indeed we might appreciate the force of the suggestion, but our right being to a share in a valid and living franchise and the object of our suit being to secure and realize this right, how could the proceeding by *quo warranto* serve our turn?

Ground VIII of Demurrer.

WE UNDERSTAND THIS GROUND OF DEMURRER TO MEAN THAT THE COMPLAINANT DOES NOT COME INTO COURT WITH CLEAN HANDS.

The contention here is, in substance, that it is incon-sistent, unconscientious, harsh, and oppressive in the plaintiff to embarrass the development of the Broad street franchise by his suit while claiming to be interested in it. The point has already been touched upon in our brief, in discussing the remedy at law; but it may be well to repeat here that this ground of demurrer, especially, cannot be fairly discussed except upon the basis and concession of the validity of our asserted rights and claims; and if this concession be once made, or this hypothesis be once entertained, how can it possibly be considered unconscientious, harsh, or oppressive in us, to prosecute these rights and claims against parties who not only deny and repudiate them, but have taken every step in their exclusive appropriation of our property after the fullest notice of our claims, and most of these steps after bill actually filed for their enforcement.

Ground IX of Demurrer

WHO ASKS EQUITY MUST DO EQUITY.

And we have done it—every jot and tittle the contract required of us. The bill asserts this, the internal evidences support it, and no one denies it. As to our demanding the issue to us of stock to which we have never subscribed, the bill clearly, fully and emphatically sets out that we did not subscribe because we never had the opportunity of doing so, and that the one definite purpose of the defendants in all they did in connection with the organization of the Company, and the issue of its stock, was, that we should not have such opportunity; but this point too is incidentally disposed of in our brief. We never had an idea of claiming stock without doing everything which equity or law required as a condition precedent to our receiving it.

Ground X of Demurrer.

THE DEFENDANTS BY THIS GROUND OF DEMURRER PRACTICALLY CONTEND THAT THE SECOND AMENDED BILL IS NOT PROPERLY AN AMENDMENT, BUT AN ATTEMPT TO MAKE A NEW CASE.

The point here presented having been, after full argument, settled adversely to this contention of the defendants by the order of the Circuit Court allowing the said bill to be filed, we shall not at this stage re-open the discussion, but insist that the demurrer now being considered by this honorable Court having been filed below to the bill after the last amendment, must be tested by the bill as last amended, and by this test must stand or fall. See:

Neale v. *Neales*, 9 Wall., 8–9.
The Tremolo Patent, 23 Wall, 527.
Richmond v. *Irons*, 121 U. S., 43–49.
Jones v. *Van Doran*, 130 U. S., 690–692.
Hardin v. *Boyd*, 113 U. S., 761–765.

In re Sanford F. & T. Co., 160 U. S., 255–259.
Mitford's Ch. Pl., 326, 331.
Story's Eq. Pl., 904, 905.
Daniel's Ch. Pr. & Pl., 463, 466.
Belton v. *Apperson*, 26 Gr., 207, 215–217.
Smith v. *Smith*, Cooper Ch. Cas., 141.
Philhower v. *Todd*, 3 Stock. R. 54, 312.
Buckley v. *Corse*, Saxton's R., 504.
Anthony v. *Leftwich*, 3 Rand., 238.
Parrill v. *McKinley*, 9 Gr., 1.

Respectfully Submitted,

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